ARBITRABILITY OF MEDICAL NEGLIGENCE IN NIGERIA

BY

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SUPERVISOR

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SEPTEMBER, 2025

TITTLE PAGE

ARBITRABILITY OFF MEDICAL NEGLIGENCE IN NIGERIA

DECLARATION

I, Uduma Chima Kalu, hereby solemnly declare that this research work, titled "**The Arbitrability of Medical Negligence in Nigeria"** submitted in partial fulfilment of the requirements for the award of LL.B, is an original and authentic production of my intellectual endeavours. I attest that:

1. All sources utilized in this research have been properly acknowledged, cited, and referenced in accordance with established academic conventions.
2. This work does not infringe upon any copyright, patent, trademark, or other intellectual property rights.
3. This research was conducted in compliance with applicable laws, regulations, and ethical standards.

I hereby assume full responsibility for the accuracy, integrity, and validity of this research.

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APPROVAL

It is hereby approved that this project entitled "**ARBITRABILITY OF MEDICAL NEGLIGENCE IN NIGERIA**" meets the requirement of Bachelors of Laws (LL.B) of the Faculty of Law, Alex Ekwueme Federal University, Ndufu Alike Ikwo, Ebonyi State.

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CERTIFICATION

This is to certify that this long essay titled "**ARBITRABILITY OF MEDICAL NEGLIGENCE IN NIGERIA**" has been accessed and approved by the Undergraduate Studies Community of the Faculty of Law, Alex Ekwueme Federal University, Ndufu Alike Ikwo, Ebonyi State, as an Original research work carried out by Uduma Chima Kalu with the Registration number 2020/LW/15188 in the Faculty of Law, Alex Ekwueme Federal University, Ndufu Alike Ikwo, Ebonyi State, under the guidance and supervision of Barr. Nnaemeka Nweze

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DEDICATION

To the Almighty God, for being my anchor throughout the turbulent and wonderful days of my university life.

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N

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LIST OF ABBREVIATIONS

A.D.R.	Alternative Dispute Resolution
M.D.C.N.	Medical and Dental Council of Nigeria
U.C.H.	University College Hospital (Ibadan)
N.M.A.	Nigerian Medical Association
N.I.C.Arb.	Nigerian Institute of Chartered Arbitrators
I.C.A.M.A.	International Centre for Arbitration and Mediation, Abuja
U.N.C.I.T.R.A.L.	United Nations Commission on International Trade Law
E.M.R.	Electronic Medical Records
C.M.E.	Continuing Medical Education
U.T.B. (Nig)	Universal Trust Bank (Nigeria)
U.S.A.	United States of America
U.K.	United Kingdom

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ABSTRACT

This Long essay critically examines the arbitrability of medical negligence under Nigerian law, with particular focus on the tension between private dispute resolution mechanisms and public interest in healthcare accountability. While arbitration is widely accepted for commercial disputes, its application in sensitive areas like medical negligence raises complex legal, ethical, and policy concerns. The research investigates whether claims arising from medical errors, patient rights violations, and healthcare malpractice fall within the scope of disputes that can be validly submitted to arbitration in Nigeria. The study explores relevant statutory frameworks, including the Arbitration and Mediation Act 2023, the National Health Act 2014, and judicial pronouncements, to determine the enforceability and limits of arbitration agreements in the healthcare context. It also assesses comparative practices from other jurisdictions and evaluates the suitability of arbitration in protecting patient rights, ensuring confidentiality, and delivering timely remedies. The paper argues for a balanced approach one that promotes access to justice and procedural efficiency, without undermining public interest or patient safety. It was therefore recommended that for legislative clarity, institutional reforms, and awareness creation, to foster a fair and effective use of arbitration in resolving medical negligence claims in Nigeria.

CHAPTER ONE

1.1 Background to the Study

It is public knowledge that the health care sector of Nigeria is in a terrible condition and a messy situation. The assertion is further supported by statistics of Nigerian patients having one of the highest mortality rates in the world[1]. In fact, it ranks 75th in There is a real risk of injury or death from the problems arising from the inadequacies of the health sector of the country and in its specific delivery system in individual cases. Over the Death rate comparison 1 and 22 in the Death rate by country in 2025[2]. the years, the Nigerian health sector has greatly declined Another Challenge is the problem of "Brain Drain" in the medical profession. In recent times, there have been reports of hundreds of graduates of medicine and other medical-related courses migrating to other countries in search of greener pastures.[3] This has created a prevalent problem of shortage in the availability of health personnel in meeting the minimum standard of primary health care delivery, resulting in poor health outcomes, illness and high levels of mortality[4] measured by life expectancy, the general health of the population has taken a downturn.

The consequences of this problem "Brain Drain" are far reaching and it involves cases of Clinical and Medical Negligence on the part of the health care providers which are cases of mis diagnosis of patients, failure to give maximum attention to patients, and common mistakes such as leaving swabs within a patient's body after surgery or failure to properly stitch the patient after surgery. These challenges are prevalent and they are increasing daily[5]. A renowned author cited

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[1] . http.www.CIA.gov.com
[2] . http://www.worldpopulationreview.com
[3] . Obiajulu Nnamdi, 'The right to health in Nigeria center for health'[2007] (1)
[4] . Fitz mullan, 'The metrics of the physician Brain Drain' *New England journal of medicine* [2005] 35(2)1817
[5] Dennis Uba Donald 'The Curious Case of medical negligence in Nigeria [2014] (2)(1)

one of such horrible incidents captioned in the case of UCH v Baby Kehinde , involving a baby who had her hand amputated three months after her birth in what the hospital's Chief media director described as a " regrettable mistake".[6] in another horrific case, in 2010, a doctor slashed a baby's head during a Caesarean section commonly known in the normal parlance as C- section on the baby's mother.[7]

The victim in this case suffered brain damage in which the medical doctor apologized and called the accident an inadvertence. It is annoying because doctors use different terminologies in an attempt to mitigate the harshness of their actions[8]. It has been long established as a principle of law that a medical doctor or health care provider owes a duty of care to a patient who submits himself for treatment at least a reasonable amount of care and to act in the best interest of the patient who is receiving treatment.[9]. This duty is a result of the relationship between the health care provider and the patient which has been described as a fiduciary relationship[10]. A breach of this duty will make the medical practitioner incur certain liability and such liability may be civil contractual even criminal liabilities as the case may be.

The legal reason for holding a medical doctor or health provider liable is laid on the prevalent assumption that in a civilized environment, each person is to be held responsible to others not to cause injury to them or any bodily harm to them and there should be liabilities for occasioned injuries or harm to punish the wrong doers or generally grant compensation to victim[11]. When they incur damages or injury which are actionable, they attribute it to the will of God or gods or the

[6] OA Yusuf, 'The prospect of litigation in medical malpractice or negligence in Nigeria.
[7] C Izuekwe, ' Careless Doctors own up their mistakes at https// www. pmnews Nigeria.com/2010/05/18 careless doctors own up to mistakeat https\\\www.pmnews Nigeria.com\2010\05\18.
[8] ibid
[9] Unilorin Teaching Hospital v Abegunde [2013] LPELR -21375(CA)
[10] Abatan v Awudu [2003]NWLR (Pt 829) 451
[11]Nigerian Criminal Code s343

popular verse of the Bible the holy book of the Christian Religion " The Lord has given and the Lord had taken away Blessed be the name of the Lord."This attitude may account for the low number of reported cases of medical negligence claims in Nigeria.

Resolving the issues of medical negligence cases can be complex, time consuming and costly. Traditional litigation may not always be the most effective or efficient way to resolve these disputes because there is a general notion or assertion that Victims that know that their rights and take steps to make claims in conventional courts are not likely to succeed in a claim for medical negligence under conventional tort law principles, for different reasons such as difficulty of adducing expert evidence, the application of a conservative test for the determination of professional negligence and difficulties in regards to proof of intention and causation etc. The above highlighted issues are different from the problems of high financial and emotional costs of the litigation exercise and the damage done to the relationship that must have existed between the patient and the health care provider. A good alternative to these issues is to be referred to the alternative dispute resolution which is faster and less time - consuming and less costly and more private than conventional litigation[12].

In recent years, alternative dispute resolution (ADR) methods in which Arbitration falls under have gained attention as a potential means of resolving medical negligence disputes. Arbitration offers a private, binding, faster and cheaper ways of conflict resolution than conventional litigation. On the other vein, Arbitration can provide patients with the same benefits that it offers health care providers plus the benefits of a quick and final decision which is faster than a trial and binding on the both parties. This also benefits those patients who may be forced to settle if they

[12] Jaccqueline Ben 'Medical malpractice Arbitration

exhaust their financial resources while pursuing a claim in court. The patient not only will they receive compensation more quickly, but also lower legal fees. The Long Essay aims to explore and evaluate the principles of arbitrability of medical negligence cases, a careful examination of its benefits and carefully highlighting its limitations as a means of dispute resolution. By the careful analysis of the legal, regulatory and institutional framework charged with the sole purpose of governing medical negligence and arbitration, this long essay also contributes to the wider and more interesting understanding of the role of arbitration in easier and faster accessibility to justice and improvement of patient safety. The long essay also advances the argument that Medical negligence disputes are arbitrable in Nigeria.

1.2 Statement of the problem

The increasing prevalence of medical disputes in Nigeria's health sector poses a very pertinent challenge to health care providers, patients and to the Nigerian health and legal system at large. Conventional Litigation which may be often be time - consuming and expensive may not provide an efficient or very effective way of resolving these conflicts. The most prevalent problem necessitating this research is that litigation in most cases of medical negligence is not well - suited and tailored to handle the complexities and technicalities associated with cases of medical negligence in Nigeria. Another issue is that the arbitrability of medical negligence in Nigeria is a novel and emerging aspect of law in Nigerian Jurisprudence. Coming from the previous issue, another problem is that the fact there is a dearth of local literature on the subject matter of the arbitrability of medical negligence in the county. The fact is that Nigerian Conventional Courts have not had the opportunity to give their decision on whether medical malpractice which sometimes either be tortious , criminal and contractually liable are arbitrable. But I strongly believe that the decision of the court would be dependent on the type of liability to be incurred. If it is a

contractual liability or tortious liability and there is an arbitration agreement which expressly stipulates that dispute arising from the contract would be referred to an arbitration panel, then the tortuous and contractual claim would be arbitrable. This was clearly envisaged in the case of Gateway Holding Ltd v SAM $ T LTD[13] the court per Abubakar (JCA) adopted the dictum of Pat Acholonu (JSC) in WCC Ltd v Batalha, [14] on the need for the non - interference of the court in contractual agreements as follows:

> " it must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy because if there was one thing which more than public opinion requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered freely and voluntarily, shall be held sacred and shall be enforced by courts of Justice. There you have this paramount public policy to consider, that you are not likely to interfere with freedom of contract."

So with this assertion, I strongly believe that contractual and tortuous claims under medical negligence are arbitrable and the National Courts would refer it to an arbitration panel if there was an arbitration agreement that stipulated or gave provision for it. In Criminal liabilities, it depends on the veracity of the liability and the jurisdiction because some states have adopted some forms of ADR in Criminal justice. The Magistrate Laws of Lagos State states and I quote "In criminal cases, a magistrate may encourage and facilitate the settlement in an amicable way of proceeding for common assault or any other offence not amounting to felony and aggravated in degree, or terms of payment of compensation or other terms approved by him". With the above provision,

[13] [2009] 13 NWLR (Pt. 1158) 344.
[14] [2006] 9NWLR (Pt. 986) 595.

the arbitrability of criminal liability in cases of medical negligence is not yet fissable but with more research, ideas , views and more legislation, it would be possible in recent years.

Jurisdictions like The United States of America have laws mandating Arbitration as a compulsory course of action for issues such as medical negligence claims. This is the opposite of the situation in Nigeria where claims of medical negligence solely rely on common law and equity principles, various Tort laws of different states, Criminal and Penal Codes which can be vague and ambiguous when it comes to the cases of medical negligence. This has made circumstances difficult and uncomfortable for the arbitrability of medical negligence to entrenched in Nigerian Legal System. Despite the recent development on Arbitration and the issue of medical negligence, there is a lot of work to do on the part of our National Assembly, National Courts, Learned Writers etc on this very important.

The Research questions that would properly guide this analysis are:

1. What are the legal and institutional frameworks governing medical negligence in Nigeria, and how adequate are they in the arbitrability of medical negligence dispute?
2. To what extent can medical negligence dispute be resolved in Nigeria, considering the complexities of medical negligence cases?
3. What are the advantages and disadvantages of using arbitration to resolve medical negligence disputes in Nigeria, compared to traditional litigations?
4. What are the challenges and limitations of arbitrating medical negligence dispute in Nigeria, and how can they be addressed?

1.3 Aims and Objectives of the Study.

The Aim of this research is to unveil the concept of arbitrability of medical negligence cases, properly dissecting it's potential benefits, applicability and limitations in complex medical disputes resolution.

Objectives

1. An Elaborate Analysis of the legal and institutional framework of arbitration and medical and health Sector.

2. To give a clear assessment of the suitability of the arbitration of medical negligence in Nigeria.

3. Clear identification of the benefit, limitations and applicability of arbitration of cases of medical negligence..

1.4 Limitations of the Study.

Limitations

1. Limited Jurisdiction: Most of the research of this study are limited to Nigerian Territorial Jurisdiction which is Nigerian Health Care System and it's Legal Framework.

2. Emerging Principles on Arbitration: Due to the Evolving nature of Arbitration Laws and practice, this study may not capture all it's recent development.

3. Limitations as to total access to data: Access to Medical records, Court files and expert opinion may be restricted.

Despite these limitations, the study tends to give a clear analysis on the arbitrability of medical negligence in Nigeria by providing insight in order to aid it's development in Nigeria.

1.5 Significance of Study

The study of the "Arbitrability of Medical Negligence" holds a very vital importance for various parties involved in such disputes which includes patients, Health Care Providers and Policy makers and possibly the Nigerian Legal System.

The following reasons would help elaborate on the importance of the study.

1. Improvement on the Accessibility of Justice: The findings of this study would inform the development of more effective and efficient Arbitration settlement mechanisms which in turn improve access to justice for patients who have suffered medical negligence. By the exploration of the potential benefits and limitations of arbitration, the study can identify possible ways of making justice more accessible and affordable for patients.

2. Enhancement of Patients Safety: By examining the role of Arbitration in resolving medical negligence disputes, the study would contribute to a more better understanding of how to improve patient safety. The finding of the study would formulate strategies to prevent medical errors, reduction of harm and promotion of the culture of health care system.

3. Reduced Litigation Cost: The study helps to explore Arbitration as an alternative dispute resolution mechanism which would reduce litigation burden for the conventional courts and health care providers and litigation cost for the victims of medical negligence. With the provision of Arbitration in the cases of medical negligence, the load on the National Court dockets would be reduced drastically.

4. Better policy and practice: The findings of this study would improve the policy and practice of the Nigerian Health Care and Legal Systems. Policy and Decision makers can use this study's result to develop more effective policies and regulations that would govern medical negligence and arbitration. Health Care providers can also benefit from the study's finding by using them to improve their risk management strategies and reduce the likelihood of medical negligence.

5. Improvement in the Health Care Delivery System: The findings of this study would ultimately contribute to the improvement of the health care delivery system. By the promotion of an effective arbitration system in cases of medical negligence, it would help create a health care system that is more responsive and responsive to the needs of their patients.

6. Enhanced Accountability of Health Care Providers: The exploration of the Arbitrability of Medical Negligence Cases would help in the promotion of accountability in Nigerian Health Care System. By the provision of Arbitration in the resolution of cases of medical negligence, it would improve accountability and sustainability of health care providers to their patients..

1.6 Research Methodology

This Study will employ a quality and quantitative research design, effective utilization of a combined doctrinal and non-doctrinal approaches to explore the concept of Arbitrability in Cases of Medical Negligence which would include the conduction of a comprehensive review of existing literature on medical negligence and arbitration. There would be a comprehensive analysis of relevant documents which includes Judicial Precedents, Different National Legislations relating to the study to give insight into legal framework governing medical negligence and arbitration in Nigeria. Expert's Opinions would be collected in a semi structured interview in which their opinions on arbitrability of medical negligence would taken. Data would be collected and analyzed

using thematic analysis, identification of patterns, themes and concepts related to the arbitrability of medical negligence disputes. Contents to be analyzed would be subject to content analysis, identification of keys concepts, themes and provision related to Medical Negligence and Arbitration.

1.7 Chapter Analysis

Chapter One gives a clear analysis of the background of study, statement of problem, Aims and Objectives, Significance, Research Methodology of the study. This simply means that the contents of chapter one are introduction to the study which is the introduction of the Arbitrability of medical negligence.

Chapter Two is about the conceptual clarification, theoretical foundation and literature review. The contents of Chapter two are the definition of the various concepts of the study which includes medical negligence, Arbitration, medical malpractice, tort law, Duty of Care, Standard of Care, Patient Rights and Health Care providers. It also contains an explanation to some theories such as contract, institutional, justice, Social Exchange, Risk Management and System Theory. Then there is the literature Review which is a Review which is a Review of everything in the chapter 2 including which words and terminologies used.

Chapter Three: Chapter three gives a clear analysis about the legal, institutional and regulatory framework that controls the Arbtrability of medical negligence. Legal framework includes The Constitution of Federal Republic of Nigeria 1999 as amended, The Arbitration and Mediation Act 2023, National Health Act 2014, Medical and Dental Practitioners Act. Institutional framework includes Nigerian Medical and Dental Council of Nigeria (NMDA), Medical and Dental Council of Nigeria (MDCN), International Nigerian Arbitration and Mediation Center (NAMC), Chartered

Institute of Arbitrators (CIArb) Nigerian Branch, Nigerian Courts. Regulatory framework includes Rules of International Nigerian Arbitration and Mediation Center and Code of Medical Ethics.

Chapter Four gives a clear analysis to the critical issues and concerns that affect the Arbitrability of medical negligence in Nigeria which includes Negating factor of the Arbitrability of medical negligence, issues of medical errors and it's prevention, Rights of Patients, Liability of Health Workers, Enforceability of Arbitrary Award given in a case of medical negligence.

Chapter Five gives well elaborate Summary, Conclusion and Recommendations of the study not just only the Summary but contribution to knowledge, Areas for Studies

CHAPTER TWO

LITERATURE REVIEW

2.1 Conceptual and Theoretical Frame Work And Related Literature.

2.1.1 Definition of Medical Negligence

All over the continents of the world, people at various times suffered damage from careless acts of other persons. A Negligent act may be done intentionally, unintentionally or accidentally. As a general rule, negligence occurs where the duty of care has been breached. The purpose of the tort of negligence is to properly identify the breach of duty of care and offer remedy to a person who suffered harm as a result of the breach of duty of care. Negligence is derived from the Latin "negligentia" from "neglegre" which means to neglect. This tortious act of negligence has to do with harm caused by carelessness not necessarily intentionally harm; Lord Wright a renowned jurist further explained by postulating that "in strict legal sense, negligence means more than heedless or careless conduct whether in omission or commission. It properly connotes the complex concept of duty, breach, damage thereby suffered by the person to whom the duty is owed."

In Modern Nigeria, there is an alarming increase of poor health care ranging from inaccurate diagnosis to wrong prescription of drugs, down to delay or withdrawal of treatment: all amounting to medical negligence. Unfortunately, this lack of responsibility has in no way troubled the conscience of the average Nigerian Medical practitioner who in desperate search of easy wealth and riches (other than the pursuit of the safety of humanity) has obstructed his call. Unfortunately, this problem is not only associated with the poor as even the rich, have in one way or another has bled to death by the unsterilized dagger of the surgeon in whose hands life should ordinarily be saved. In order to escape this dilemma, the rich would have in the time of medical attention sought

help from health care providers based outside Nigeria who to a great length understand the importance of life and it's irreplaceable value. For those who have followed this progression by fleeing the country has not addressed this prevalent medical problem, as in certain cases, the health care providers abroad are which are disguised as "medical angels" have also led to the dark gallows that they were trying to avoid in Nigeria.

What is Medical Negligence? Medical negligence can be defined as any negligence by an act or omission of a medical practitioner in his performance of his duty.[15] Medical can be also defined as an improper, unskilled or negligent treatment of a patient by a medical doctor, nurse, dentist, pharmacist or other health care providers. It is vital to note that whilst medical negligence is generally used in reference to medical doctor, other health care providers such as pharmacist, nurses, dentists and laboratory attendants any other health care providers can be liable. Medical negligence can be further defined as the failure on the part of a medical practitioner or any skilled certified health care provider to exercise a reasonable degree of skill and care in the treatment of a patient in a manner which is negligent nature thereby causing harm or making a significant increase in the declining health condition of the patient. The patient can bring an action against the health care provider claiming damages for harm suffered.

The Nigerian Supreme Court in the case of UTB (Nig) v Ozoemena[16], also defined negligence as:'Lack of proper care and attention; careless behavior or conduct; a state of mind which is opposed to intention; the breach of duty of care imposed by common law and statue resulting in damage to the complaint'.

[15] https://defintions.uslega.com/m/medical-negligence. l

[16] [2007] 3NWLR (Pt. 1022) 448 (SC).

The tort of negligence has undergone a series of developing over the years and it has been critically designed to redress the damages suffered by affected persons and to incur liability for person who committed the negligent act. However it is imperative to note that all careless actions can give ground for a successful claim in tort.

The Locus Classicus of negligence is the case of Donoghue v Stevenson [17].

The Medical Profession is commonly known or regarded as a noble profession bound by it's rules and regulations both National and intentionally. All Licensed medical practitioners are expected to perform their duties and functions in account with the provisions of various rules and regulations that guided the operation of their profession. These stipulated rules and regulations also make provisions of handling any form of malpractice and negligence by medical practitioners.

In Nigeria, there has been an increase in negligent acts by medical practitioners over time. Medical Negligence is not one act or takes a particular sequence before one can establish that it has happened, it can take various forms such as; Administration of drugs to a patient by a pharmacist without prescription, slow and sluggish attention towards the needs of sick persons by nurses or a surgeon forgetting to remove a foreign item that has been lodged inside the patient's body after operation including other horrors.

In general term, when a medical or dental professional conducts himself in such manner regarded as disgraceful or dishonorable by his professional colleagues of good repute and competency

[17] HL Attia v British Gas plc [1987] 3WLR 1101 CA: Haley v London Electricity Board [1964]3 All ER 185 AL.

during the conduct of his professional duty then he can be held liable for medical negligence due to the nobility and highest ethical standards that is required of its members.

These following actions will constitute medical negligence:

1. Wrong or incorrect Diagnosis: A medical practitioner is expected to conduct or run a proper and complete diagnosis on a patient to properly ascertain the root of his sickness before going on to administer any form of treatment. In case of De Freville v Dill[18], a medical practitioner without due diligence certified a man as being of unsound mind; he was held liable in damage for just the action of detention of the patient in a mental hospital. The Court of Appeal ilorin teaching hospital v Mrs Theresa Akilo[19] held that; 'A Medical doctor is liable in negligence if without due diligence, care and skill he wrongly diagnosed a patient's ailment resulting in error in treatment..'

2. Neglect of a patient: Where a Medical practitioner fails to see a patient regularly without any vaild reason or where there was an intentional neglect of that patient, such medical practitioner will be liable for negligence. In the case of Denloye v Medical and Dental Practitioners Disciplinary Commitee[20]. The facts of the case was that, Dr Denloye, a medical practitioner was found guilty of professional misconduct on five count charges. The first count charge was on the ground that the appellant neglected his patient Fatilatu Bisiryu. The doctor was directly in charge of treating the patient under the western Nigeria Ministry of Health. The medical and dental practitioner disciplinary tribunal found him guilty of all charges and his name was subsequently struck off the register. He appealed the decision of the tribunal at the court of appeal and they ruled

[18] [1927] 1 KB 332.
[19] Ilorin Teaching Hospital v Mrs Theresa Akilo (unreported, Court of Appeal, 1985).
[20] .[1968] 1 All NLR 306.

in his Favour due to technicalities. This case shows that a medical doctor can be liable for negligence when he intentionally neglects a patient under his care.

3. Failure to offer immediate attention to a patient:

It is the duty of a medical professional to offer or give immediate attention to a patient especially when it is an emergency situation requiring immediate treatment. In case of Dickson Igbokwe v University College Hospital Board of management.[21] The court held that the hospital was liable due to the fact that the deceased was not closely monitored despite being diagnosed of a serious mental issue.

4. Non removal of external objects during and after operation:

This is a result of a medical doctor after performing a surgery with the nurse in the theater whose responsibility is the swabs count leaves in the patient's body swabs, towels and other foreign objects after the operation. This act will amount to medical negligence on the part of the doctor and a claim for negligence will suffice. And the defendant would be the doctor who performed the surgery, the nurse and the hospital management. This was evident in the case of Mahon v Osborne [22] where swabs of cotton were lifted inside of his abdomen after a medical surgery was conducted. The patient was unconscious throughout the period that the surgery lasted and there was no prior consent on the part of the patient for those cotton swabs to be put inside of him and he had no idea that those swabs were left in his stomach. He sued for negligence and the court held that the defendant were liable for negligence.

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[21] Dickson Igbokwe v University College Hospital Board of Management (unreported, Ibadan High Court, 1978).

[22] [1939] 2 KB 14.

2.1.2 Arbitrability

Arbitrability means the condition of validity of the arbitration agreement and arbitrator's jurisdiction. It is simply the question of what types of issues. A renowned writer Russell has this to say on Arbitrability

> 'The issue of arbitrability can arise at three stages in an arbitration first, on an application to stay the arbitration, when the opposing party claims that the tribunal lacks the authority to determine a dispute because it is not that the tribunal lacks the authority to determine a dispute because it is not arbitrable; secondly in the course of the arbitral proceedings on the hearing of an objection that the tribunal lacks substantive jurisdiction and thirdly on an application to challenge the award or to oppose it's enforcement[23].

The issue of Arbitrability touches on the capacity and jurisdiction of the arbitrator(s) or the arbitral panel to preside over an arbitration with respect to any matter that is brought before them. It is an issue of jurisdiction. It is a question as to whether or not an arbitrator(s) have the authority to determine a dispute. The answer to this assertion depends on whether certain parties have agreed to have certain dispute between them resolved or determined through arbitration. Issues of Arbitrability are conditions that must fulfilled and met in order for the arbitration proceeding to go forward. It is relevant to the issue whether there was between the parties to arbitrate[24], whether the arbitration clause forms part of the main of transaction contract, whether the claim is statue barred, failure to satisfy the condition precedent before submitting to arbitration, whether the agreement is valid and enforceable according to the law[25], whether the parties had in any way give their consent either by way of executing and appending their signature to the agreement[26], whether the agreement was made in relation to a particular dispute being referred[27], whether the basis of public

[23] DS Sutton, J Gill and MR Gearing on Arbitration (23rd Ed sweet & maxwell 2007)15.
[24] Equitable Res Inc v United States Workers int union local 8-512.
[25] . AT&T Techs inc v comm workers [1986] cox 533 (1114)
[26] John Wiley & son inc v Livingson [1963] 376 us 547.
[27] Sherer v Green Tree servicing l.l.c [2008]548 f. 3rd 371,381.

policy and law that the dispute in relation with a particular subject matter can be referred to arbitration.

. Arbitrability also determined whether a particular dispute which may be determined or resolved by arbitration. In other words, arbitrability provides for the type of dispute which may be determined or resolved by arbitration and which is solely applicable to the jurisdiction to the conventional courts. It simply means this disputes are within the armbits of the National Courts, National and regional legislations and they cannot in any reason be referred to arbitration for resolution. With strict adherence to the provisions of UNCITRAL Model Law in Article 3(3) which was clearly explained above, that arbitrable disputes is centered on the fulfillment of the following conditions they are subjective arbitrability, objective arbitrability and procedural compliance and they would be explained properly below.

1. Objective Arbitrability: This involves the determination of the subject matter that can be referred to arbitration. On a general note, any issue that involves an economic interest or in matter in which both parties are entitled to conclude a settlement are arbitrable.

2. Procedural Compliance: Certain issues can be resolved through arbitration if it has been proved that the required procedure was strictly adhered to. enforcement[28]. It's enforceability required the inquiry of the enforcing court on it's statute in order in the determination of the arbitrability of the said dispute. 'Recognition and enforcement of arbitral award maybe also be refused if the competent authority in the country where recognition and enforcement sought finds out that; the

[28] http://www.unictral.org:pdf/english/colloquial/4th sec trans/ presentation action BaleR pdf.

subject matter of the difference is not capable of settlement by arbitration under the law of that country'[29]

This principle has been followed by many countries in quest to determine the arbitrability of certain disputes. These involves the existence of a written arbitration agreement, the stand of the statute of limitation in retrospect to the dispute which has been arbitrated, the failure to satisfy a condition precedent before submission before the arbitration panel, whether the parties gave their consent to mutually arbitrate, the purpose of the arbitration agreement whether it covers the issues between both parties or whether it is on the public policy and statue that that particular dispute can be referred to arbitration etc. The provision of a statute can determine which kind of dispute are arbitrable and which one should be resolved by conventional litigation. And it is mandatory to expressly state that this particularly that conventional court is the only prescribed mode of resolving that particular dispute.

Determinant of Arbitrability

The issue will depend on the question "who determines arbitrability"? And the answer to this question would depend on the location where the question was raised. If it was raised in a National court, as a ground for setting aside the arbitration agreement or award, then the vital issue of arbitrability will be rightfully decided by court. In a scenario where the question was raised for determination as to the determination of the arbitral tribunal's jurisdiction, then it will be the sole right of the tribunal to decide because the tribunal is within the power to determine whether or not it has jurisdiction to entertain that particular dispute that has been brought before it.

[29] Art New York Convention.

2.5 Duty of care

It is a principle of law that health care providers have a duty of care to their patients. This duty of care is so important and vital that it must be done with a great degree of competence, precision and skill that an average health care provider under similar circumstances is expected to use. The issue of medical negligence occurs as a result of the breach of the duty of care by the health care provider to the patient. The duty of care is centralized on the popular notion that in a civilized setting, every individual's responsibility is not to cause any form of harm to another individual

This principle was further given a more comprehensive concept in the case of Donoghue v Stevenson per Lord Atkin who postulated that there is a general duty to take reasonable amount of care to prevent injury to your neighbor. From this above postulations by different jurists, it is safe to define the concept of duty of care as the general duty to take reasonable care whether a professional or non professional with a great degree of care in order to prevent an injury or harm to another person either neighbor, client or any person who the duty is owed to. In modern setting, where litigation is on the increase, the number of claims of breach of medical duty is therefore on the increase, so in order to be successful in those claims, there must be a proof that the duty of care exist.

Proof of duty of care

Primarily, an individual owes another a duty of care when the other would be directly affected by his act or omission.[30] This is regarded as the "Foreseeability test" this test was postulated by Lord Atkin in the Locus Classicus case of Donoghue v Stevenson[31]. In this case, his lordship

[30] R v Bateman [1935] 94 KB 791.
[31] [1932] AC 562

explained this test as a proof of duty in which a person owes a duty of care to his neighbor(s), those neighbor(s) are those persons that would be affected directly by actions or those person(s) that the person perceived that they would suffer as a result of his actions/ omission.[32]

In proving of the existence of duty of care, there is no statute that aids in the proof of the existence of the duty of care there are yardsticks in the determination of duty of care and they are the " foreseeability test" or neighbor principle which have been explained previously and the "obligatory principle" which simply means that there is a duty of care if the person who is to be affected has no prior means of avoiding that act or omission that would affect him negatively. This assertion simply means that if the person has the obligation of preventing the foreseen event(s) and he does not prevent it that there is no duty of care. This "obligatory principle" was cleared postulated in the English case of Vellino v Chief Constable Greater Manchester (2002)[33]. It is imperative to note that the Black's Dictionary[34] defined duty of care as a legal relationship that arises from standard care, violation of which subjects the actors to liability.

2.1.7 Standard of Care

From the definition of duty of care given by the Black's law dictionary in the previous page, that the duty of care stems or arises from standard care and any breach of it would lead to liability of the tort-fessor. So what is the standard care or the standard of care? The Standard of care is the determining factor in whether there is a breach of the duty of care by the medical practitioner that is owed to the patient. The standard determines the act or omission that amounts the breach of the duty of care.

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[32] ibid

[33] [2001] EWCA (1249)

[34] Garner B A, Black's Dictionary,8th Ed,(Minnesota;West Publishing Co,2004 at pg 1536.

Standard of care in the law of negligence can be defined as the degree of care in which a reasonable man is expected to exercise in the same or similar circumstances[35], if the conduct of the defendant was not within the bounds of the standard of care, then any liability that occurred as result of his/ her conduct shall be accrued to him/her.

This assertion above brings us to another very important question, What is the reasonable man's standard. 'A Reasonable man's standard is standard of behavior or conduct of an ordinary person in any specific event, activity or transaction in which there is an adherence by the person to a special direction or law guiding that particular activity or transaction.'[36] In the case of Kabo Air Ltd v Mohammed[37], the court of appeal held that 'Reasonable care is that degree of care which a person of ordinary prudence would exercise in the same or similar circumstances' and the Court of Appeal also held in the case of Unilorin Teaching Hospital v Abegunde[38] that "a reasonable man is a person who acts sensibly, does things diligently and takes proper not excessively precautions".

In Medical Negligence Issue, the defendant's medical decision making and practice are directly compared with the generally applicable standard of care which is ought to be reasonable care, skill and diligence in which healthcare providers in good standing in good standing with the particular general practice basically have. The Locus Classicus case on the Standard of care expected of medical practitioners is the case of Bolam v Friern Hospital Management Committee[39] in which M.C Nair J had laid down what he had now come to be known as "Bolam's test"

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[35] American Academy Pediatrics.
[36] Winfield and Yollowicz cit at Pg.46
[37] [2005] 5 NWLR (pt.1451) 38
[38] [2015] 3 NWLR (pt. 1447) 421
[39] [1957] 1 WLR 582.

As follow," where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not the test of man on top of a clapham omnibus, because he has not got this special skill. The test is standard of the ordinary skilled man exercising and professing to have that special skill. A man need not posses the highest expert skill. It is well established law that it is sufficient if he exercising that particular art. Incase of medical negligence means failure to act in accordance with the standards of reasonable, competent medical men at the time. There may be one or more perfectly proper standards and if he confirms without of these proper standards, he is not negligent."

Due to the emergency trends on evidence which accepting an expert evidence there was likely abuse on the tendency of the bolam's test. So an alteration was made and it was made in case of Bolitho v City and Hackney Health Authority[40] where Lord Wilkinson held as follows;

"The court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of the opinion that the defendant's treatment or diagnosis is accorded with sound medical practice. The use of these adjectives responsible, respectable and respectable all shows that the court has to satisfied that the exponents of the body of opinion relied has a logical basis. In particular cases involving the weighing of risk against the benefits. The Judge before accepting a body of opinion as being responsible, reasonable and respectable will need to be satisfied that in forming their view, expert have directed their minds to the question of comparative risks and benefits and have reached a conclusion on the matter."

[40] [1996] 4 All ER 771.

2.2 Theoretical Foundation

Theoretical foundations refer to the underlying principles and frameworks thwart guide research and provide clear analysis on a practice in a particular field. In the context of this topic of this long essay "the arbitrability of medical negligence in Nigeria, theoretical foundations are as follows

2.2.1 Contract Theory

Common law textbooks on contract law typically defines contracts in terms of a binding promise or agreement or of a combination of two or more persons[41]. Within contemporary contract framework , it is often stated that "contractual obligations are voluntary but binding on the individuals who are parties to the contract"[42]. Contemporary contract doctrines emerged during "the final quarter of the 19th century" and represents the "legal system's reasonable and practical compromise" between "conflicting values and interests"[43].

Arbitrability

In Nigeria, disputes arising from contractual relationships, including medical negligence claims, can be resolved through arbitration. Arbitration allows parties to resolve disputes outside of court, with a neutral third-party arbitrator and parties deciding the laws that would regulate the arbitration process and the arbitrator making a binding decision.

When applying contract theory to arbitrability of medical negligence in Nigeria, several issues arise:

1. Existence of a Contract: Was there a valid existing contract between the doctor and patient?

[41] Brian Cootes Contract as Assumption 2010 10.
[42] A Robertson The Limits of Voluntariness in Contract M.U.L.R.
[43]Mason& Gageler, Foundations of Australian Federalism and the Role of Judicial Review *Hillman Science and Engineering Ethics[*1997] 3 (2) 121-136

2. Breach of Contract: Did the medical practitioner breach the contractual duty to provide reasonable amount of medical care?

3. Arbitration Agreement: Did the parties agree to arbitrate disputes, including medical negligence claims?

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The Concept of Institutional Theory

The concept of Institutional theory is a type of theory which seeks to give an elaborate explanation concerning the systematic processes, methods and reasons for organizational behavior as well as the effect of organizational behavior patterns within a broader, interorganizational scope . Institutions are defined as conventional, standardized and systematic patterns of behavior found within and across many organizations and thereby giving meaning and functions to social exchange and order. These well outlined patterns of this behavior include stipulated organizational and industry standards, routines, rules regulations and norms. Institutional theory also provides suggestion that organizational behaviors are copied and reproduced, establishing the concept of taken-for-granted norms and, eventually, widespread standardized expectations of practice. Understanding how the strict adherence to institutions, or relatively fixed and formal working rules, confers legitimacy on organizations thus create a stable psychological environment researchers to conceptually differentiate institutions from an organization's reputation, or its perceived status. This entry discusses the development of institutional theory, recent research pertaining to the theory, and the theory's implications for corporate reputation.

The foundations of institutional theory as it is currently understood took root between 1977 and 1983 amid a broader search for understanding the elements that support successful and sustained organizational performance. The general focus of organizational research has gradually shifted

during this period from analyzing the elements contained within the boundaries of the organization, otherwise known as a closed system, to one that recognized the interaction between an organization and its environment, an open system.

Sociologists John Meyer and Brian Rowan integrated and extended Max Weber's theory of bureaucratic rationalization and Philip Selznick's administrative research on organizational leadership in communities.[44] In so doing, they reinterpreted Weber's version of institutionalism, termed new institutionalism, into this environment-focused research trend with a pivotal, original article in 1977. Meyer and Rowan argued that complex relational networks between organizations, as well as the societal rules, norms, and ideologies of the institutional context, result in Weber's rationalization and diffusion of formal bureaucracy. Similar to structuration, or the way agents produce and reproduce social structure, the institutional context recursively shapes and is shaped by shared understandings of acceptable conduct (i.e., rational myths), to which organizations conform (i.e., the process of isomorphism) to attain social approval (i.e., legitimacy) and survive. However, conformity may be adopted only ceremonially or superficially by separating the symbolic practices from the organization's technical efficiency (i.e., decoupling).

The Applicability of Institutional Theory

The Applicability of institutional theory to the arbitrability of medical negligence disputes can contribute to the following;[45]

1. The Enhancement of understanding of the complexities that is associated with the concept of the Arbitrability of medical negligence in Nigeria : Institutional theory provide insights into the complex interface between institutions and the arbitrability of medical negligence disputes by

[44] JW Meyer and B Rowan Institutional Organizations: Formal Structure as Myth and Ceremony[1977]

[45] Ibid

giving an elaborate systematic explanation on the institutions that are involved in the handling this delicate concept.

2. Postulation of Institutional policy: Help policymakers and regulators develop effective institutional frameworks for arbitration.

3. Improve practice: Institutional Theory helps to create a framework for the enhancement of the practice of arbitration in medical negligence cases.

By the application of institutional theory, researchers and practitioners can gain a deeper understanding of the institutional factors influencing the arbitrability of medical negligence disputes in Nigeria..

Theory Of Risk-Management

The theory of risk-management is based on three basic concepts: utility, regression and diversification. Utility method was first proposed in 1738 by Daniel Bernoulli, resulting in the decision making process where people have to pay more attention to the size of the effects of different outcomes[46].

The use of regression began at the end of the 19th century. Later it was proved that the rule of regression functions in a variety of situations ranging from the calculation of the probability of risks, and ending with the prediction of business cycle fluctuations..

Currently, with the organization of the risk management system in the sphere of professional activity continue to engage experts in various fields and the process is described by Hubbard Douglas, Mark Dorfman, Alexander Budzier and Flyvbjerg, B. and others.

Risk Management in Healthcare

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[46] SC Steams and Daniel Bernoulli Evolution and Economics under risk [1738]

Risk management in healthcare categorically involves identification , assessment , and mitigation of potential risks or hazards to patients, staff, and health institutions . Effective risk management can mitigate the likelihood of medical negligence and disputes .

Arbitrability of Medical Negligence

The Intertwining Relationship between Risk Management and Arbitrability

The relationship between risk management and arbitrability of medical negligence in Nigeria can be seen in the following ways:

1. Reducing Disputes: Effective risk management can mitigate the likelihood of medical negligence and disputes, thereby reducing the need for arbitration or litigation.
2. Informed Decision-Making: Risk management practices can inform decision-making in arbitration proceedings, helping parties to assess the merits of a claim and potential outcomes.
3. Mitigation of Damages: Risk management strategies can help mitigate damages in medical negligence cases, which can have visibly impact on the outcome of arbitration proceedings.
4. Promotion of Alternative Dispute Resolution: Risk management practices promote alternative dispute resolution mechanisms, such as arbitration, by critical reduction of the likelihood of disputes and encouragement of parties to resolve disputes amicably.

By critically integrating risk management practices and arbitration, healthcare providers and patients can work together to mitigate disputes and resolve them efficiently when they arise.

Primary Objective of the Literature

The primary objective here is to review available literature by learned local and foreign authors in the field of medical malpractice that will be relevant to the long essay.

Literature review is an overview of previously published works on a particular topic. The term can refer to a full scholarly paper or a section of a scholarly work such as books or articles.

Bello AT postulates that Medical negligence involves confidential information in addition to the rigorous processes of proving it which has made it so tasking and undesirable for litigation process. He further stated that Arbitration is fast becoming a worldwide most acceptable Alternative Dispute Resolution mechanism. This is so as a result of its binding and extremely confidential nature. Litigation is fast becoming a dispute resolution mechanism that people are now avoiding. He further postulated that Parties to disputes now want faster, confidential and binding mechanism to use in settling disputes, especially in matters that involve highly confidential information. It is as a result of these advantages of arbitration that issues relating to medical negligence have become subject of settlement via arbitration. He further explained that Medical negligence arbitration called medical malpractice arbitration in some Jurisdictions (e.g. California) has become embedded in the Laws of some States, whereas in some countries, it remains totally strange. The reason why it may be difficult to arbitrate matters relating to medical negligence has been discussed.

The basic reason being that there is usually no valid agreement to arbitrate between the parties. However it has been recognized that some countries have tried to give room for rescission of such agreements to arbitrate medical negligence within a period of time after the signing of the agreement. However, it has been recommended that awareness should be created for medical negligence arbitration in countries where it is not known furthermore, countries already practicing medical negligence arbitration should be more flexible so as not to totally oust the option to go to

court. Often patients do not know the purpose of the document they are signing as at the point of signing and this may in turn make such an agreement unenforceable[47]..

Daniel Buter gave a clear insight that medical negligence litigation in Nigeria is fraught with difficulties ranging from interminable delays, high emotional and financial costs, extremely high standard of proof, and the uncertainty of getting compensation from the court on the part of the patient. He also continued by saying that a good solution to this problem will be to remit medical negligence claims to arbitration in Nigeria which is speedier, less expensive, and more private and ensures a higher guarantee of compensation for the victim of medical malpractice. He also noted that this fact from the position in other jurisdictions such as the United States, Mexico and Germany where arbitration has been used to settle medical negligence claims for over 20 decades and has recorded tremendous success. This is in sharp contradistinction with the position in Nigeria where arbitration has never been tested on medical negligence claims before8. He further revealed that our analysis that liability from contract, tort and crime may flow the physician/patient relationship and this presents new challenges for remitting medical negligence claims to arbitration in the sense that some of these areas of liability have been ruled off by conventional courts as non-arbitrable in the past. In other words, even if medical negligence claims were to be submitted to arbitration in the country, the courts may be unwilling to enforce such arbitration agreement. This stems from the fact that only commercial transactions and contractual matters are capable of being arbitrable in Nigeria and it is unlikely that the court will hold healthcare services as such. However, He argued that medical service agreements can, in fact, qualify as commercial transactions and contractual matters[48].

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[47] AT Bello, 'Arbitrability of Medical Negligence: The need for urgent action' *NigerJmed Nigerian Journal of Medicine* [2019] 310-319

[48] Daniel Buter Arbitrability of Medical Negligence Claims in Nigeria.

Greg Chukwudi Nwakoby, Charles Emenaogha Aduaka, Chiamaka Ifeatu Orabueze in their article Arbitration Agreement:. The Issue of Arbitrability in Nigeria Arbitration Practice[49]. postulated that Arbitration agreement is the bed rock and the legal basis of every arbitration proceedings. Arbitration agreement under the Act has to be in writing for it to be valid and enforceable. Arbitration has certain limitations placed against it by State legislation and public policy. This is because not all subject matters are possible of arbitration. Only matters which can be settled by accord and satisfaction can be subject of arbitration. However, there is no general list of issues which are not arbitrable as this varies from country to country.

The fact of arbitrability is general but the content of it is relative. In some jurisdictions, matters of crime, divorce, antitrust, taxation, and fraud are not arbitrable. But from my evaluation from his work and so far, evidence abound that non arbitrability of criminal matter and divorce petition in Nigerian jurisdiction is not wholly factual as plea bargain proceeds from negotiation which is a form of ADR and settlement of cases takes place within the Police Stations in Nigeria. In both the High Court and Magistrate Court in Nigeria parties are often encouraged to settle their matters (criminal and civil) outside the court using ADR mechanisms.

Maureen gave a report[50]. that the courts with the advent of medical service arbitration contracts faced a new kind of problem which is demonstrated by the fact that since the doctor/patient relationship is a hybrid between the private law contract and the public law tort, tension is often created between the acceptance of arbitration in contract cases and a general premise that tort law exists to force a general conformity with standards of care demanded by society, especially for

[49] GC Nwakoby, CE Aduaka, and CI Orabueze, 'Arbitration Agreement:. The Issue of Arbitrability in Nigeria Arbitration Practice' *International Journal of Law and Society.* [2018] 1(2) 92-101.
[50] M Dulen, 'Twenty years later……….. Contractual Arbitration as a medical tort Reform' *Journal of dispute resolution* [1992] 2(3).

members of a profession. To this end, areas of difficulties may be gleaned from the attitude of the courts in both pre-arbitration phase and post-arbitration.

In the former, there are certain defenses a court may use to invalidate the existence of an arbitration clause such as exculpatory clauses and public policy considerations. She further notes that the courts normally invalidate arbitration agreements on the following grounds: That such agreements are unconstitutional; that such agreements do not adhere to statutory requirements; and also the existence of contractual complications such as holding that the agreement is unconscionable due to lack of equal bargaining power or holding that the dispute is outside the scope of the agreement. Maureen points out that when the courts invalidate an arbitration clause, they do so not out of concern over an invalid contract but out of fear that arbitration are unsuitable for medical malpractice claims.

Oyebode[51]. analyzes statistics from both the UK and the US of suicides, in his article; Oyebode makes a review of statistical records of clinical errors as well as the incidences of medical negligence claims in the UK and the US. Statistical data quoted do not represent the values in Nigeria, however, the situation in Nigeria is probably worse off and a proper examination of these principles will be relevant for our analysis of a country like Nigeria that has owes much of its legislative and socio-political development to England..

Stillbirths, homicides accounting as after effects of medical treatment. He reveals that even the best doctors in the UK are not free from mistakes in treatment; therefore, clinical errors may not be evidence of intractable incompetence. He points a poor relationship with medical providers, the impression of not been kept informed by the healthcare providers as factors which might influence patients to make a malpractice claim in court. He further submits that the criminal law litigation

[51] F Oyebode, 'Clinical Errors and Medical Negligence'*Advances in psychiatric treatment.* [2006] (12)

may not solve the problem of clinical errors because convicting doctors of manslaughter may satisfy the desire for retribution, but in the end, does not solve the medical negligence problem. Oyebode in discussing incidences of negligence claims also lists error in diagnosis, suicides, failure to investigate properly or act on investigations, treatments errors and so forth. He also outlines defenses and discusses tactics for reducing clinical errors which includes: reducing the complexity of tasks; optimizing information processing by the use of protocols or aids; automating wisely and as necessary. He concludes that negligence claims in psychiatry are becoming more common and clinicians should therefore be aware of the risks that they carry and know in which areas of practice the risk is greatest.

Oyebode also recognizes defenses against allegations of failure to prevent suicide to include:

(i) Clinician acted in concordance with accepted clinical practice;

(ii) The lack of knowledge of suicidality was reasonable;

(iii) There was a justifiable allowance of freedom of movement given that the individual was on an open ward;

(iv) Clinician's decision was reasonable regarding diagnosis and/or course of treatment;

(v) Extraordinary circumstances precluded or Circumvented reasonable precautions or restraint.

In her analysis on elements necessary to find an action for the civil head of the tort of negligence, Enemo[52] lists instances of where providers owe patients a duty of care which includes the duty to give adequate counseling to patients, to warn patients of the risks involved in the medical treatment being offered, to conduct a proper examination and to make proper diagnosis; duty to administer injections, anesthesia, x-rays, and so forth. She submits that the fact that a mishap occurs does not

[52] IP Enemo, 'Medical negligence':liability of Health care providers and Hospitals[2010-2012](10).

establish negligence on the part of the provider as long as he followed the approved procedure for the treatment offered. She further notes that the standard is relative, which means that in each circumstance, the standard will be judged by factors as time, place and availability of facilities of technological development. She also cites Hatcher v Black in support. She concludes that the law should provide stiffer punishment for gross negligence so as to deter quacks from toying with lives of the vulnerable who consult them for medical treatment.

Uba[53]. in his analysis defines medical malpractice as professional negligence by act or omission by a healthcare provider in which the treatment provided falls below the accepted standard of practice in the medical community and causes injury or death to the patient, with most cases involving medical error. He suggests that individuals gain information on certain medical procedures because a lot of mishaps and accidents can be averted or forestalled if the families of the patient have little knowledge about medical processes. Uba distinguishes between medical mistake which is excusable in law and mistake which will constitute negligence. Under the former, such a mistake will be excusable due to human fallibility but under the latter, the conduct of the provider has been deemed by the court to fall below the requisite standards and he must be held liable. Uba, just like Enemo., points out the civil liability of hospitals which includes employment of competent staffs, provision of safe equipment and so on. He further underscores that the difficulty in obtaining expert witnesses to testify against medical providers should not discourage families from bringing their claims because if these series of malpractice continues goes unchecked, hospitals and medical practitioners will not be made accountable and in so doing, leading to gross misconduct and absolute professional recklessness. He concludes that both public and private hospitals must be effectively monitored by certifying bodies which must be always

[53] DU Donald, 'The Curious Case of Medical Negligence' *The international journal of Indian psychology.*[2014] 2(1)

prepared to demonstrate that recipients of such certification have shown integrity, competence and professionalism.

It is unclear whether Uba referred to the defense of mistake under the Criminal Code which exculpates a person who would have otherwise been convicted of a crime. However, it is noteworthy that in a civil action for medical negligence, mistake may not furnish sufficient defense.

Okojie[54]., in his analysis, decried the increased incidence of medical malpractice cases which sadly has led a lot of people to their untimely graves. He writes from the medical ethics point of view, tracing the historical modification of the Hippocratic Oath and the several international conferences that occasioned it. He cites the Medical Practitioners Act of 1963 in discussing the qualifications required of a medical doctor. He lists some practices which medical practitioners are to avoid, a finding of which would constitute professional negligence. He then argues that although the rules are enforced by the Medical Council, legal problems have arisen in the past. This was, as he put it, in connection with the court's strictness on the application of natural justice in situations where decisions are made by the tribunal in disregard of these principles. He cites the cases of Garba v University of Maiduguri[55] in support. In his book on Professional Negligence in Nigeria' it is apt to note, that there is no Medical Practioners Act in the Laws of the federation, what is obtainable is the Medical and Dental Practitioners Act, Cap.M8, Laws of the Federation of Nigeria, 2004. In addition, without dwelling too much on the glaring fact that he cited only one statute, the said act has by virtue of s 20(1) of the former, been repealed. This means he cited an invalid statute.

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[54] E Okojie, 'Professional Negligence in Nigeria' available at https://www.nigerialawguru.com/PDF.com.

[55] [1986]1 NWLR (Pt. 18) 550.

He however restricted occasions to the following listed conducts: Advertising, addiction, abortion and Adultery. He failed to use a non–restrictive phrase like, “includes the following”.

Submissions, Okojie, like Enemo finds that the mere occurrence of some misfortune does not as a rule make someone automatically liable. If it were so, doctors would out of fear of litigation, rarely show that degree of initiative and confidence, which is necessary for the proper exercise of their noble profession. The judge must therefore look at the evidence and decide whether or not the defendant did something he ought not to have done or failed to do that which he ought to have done.

Okojie further submits that the emphasis placed by the law on compliance with accepted professional practice might likely act as a disincentive to innovation that might prove beneficial to the society. He cites Bolam v Frien Hospital Management Committee[56] where the standard of care of a professional was established. He further suggests that the Nigerian Medical council should lay down standards of fitness to practice and also exercise discipline over the medical practitioner whose professional negligence is an embarrassment to the council/ He finally recommends that the Nigerian medical association should not clamp down its members who testify for victims against a fellow doctor as this would encourage high standard practice amongst medical practitioners in Nigeria.

[56] [1957] 1WLR 582.

CHAPTER THREE

LEGAL AND INSTITUTIONAL FRAMEWORK AND THE REVIEW OF RELATED LITERATURE

3.1 Legal Frameworks

3.1.1 The Constitution of the Federal Republic of Nigeria 1999 as amended

The Constitution of Nigeria is the defined as the law which all Laws, Governments and Authorities in Nigeria derives its authenticity from. It is also known as the grundnorm. It consists of Eight Chapters and Eight Schedules. The Nigerian Constitution provides a very vital legal framework for the governance of the arbitrability of medical negligence in Nigeria. These vital aspects include:

a. Arbitration as a legal means of dispute resolution: The provisions of *Section 4 and 5* [57] grants parties the right to agree to arbitration for dispute resolution. The primary reason for this assertion is this according to the provisions of the above sections the Arbitration is a creation of the law which is the Arbitration and Mediation Act[58] which is the creation of the National Assembly which according to the above provisions of the constitution[59] which automatically makes arbitration a court of competent jurisdiction however at the same not being a court because of its nature of proceedings.

[57] Constitution of the Federal Republic of Nigeria 1999 (as amended),
[58] 2023.
[59] Constitution of the Federal Republic of Nigeria 1999 (as amended), ss 4 (a)(b) and 5 (j)(k.)

b. The principle of fair hearing: Section 36 4: The Constitution[60] provides for one of the most important rights which is the right to fair hearing, which is the bed rock of arbitration proceedings. Despite the exact stipulation of the Constitution is that of criminal proceeding or litigation, every action including civil and criminal is hinged on this vital principle. One of the main kennels of Arbitration procedure and proceeding in Nigeria is to fast track this vital principle or right of fair hearing.

c. Right to Adequate health care and health care facilities: According to the provisions of Constitution[61] which stipulates that every citizen of the Federal Republic of Nigeria has the right of access to health care and health care facilities. The above provision is also known as the essential right of access to healthcare and healthcare facilities. However, the provisions of Section 17 of the constitution which is encapsulated in chapter 2 which is non justiciable according to the provisions of Section 6(6)(c) [62]. However, in the celebrated case of *Attorney-General of the Federation v Attorney-General of Ondo State*[63] where the Supreme Court held that the provisions of Chapter II of the Constitution are not enforceable by the courts and cannot constitute the basis of a cause of action. However, the Court noted that where a statute is enacted to give effect to a provision in Chapter II, then such rights can be enforced through that statute.

So, if the National Assembly passes a law based on a Chapter II directive, that law becomes enforceable even if the original constitutional provision is non-justiciable. So, this landmark decided authority has changed the trajectory of Nigerian Medical Jurisprudence in which Actions

[60] Ibid, s36(4).
[61] Ibid, s 17(3)(d).
[62] Ibid.
[63] [2002] 9 NWLR (Pt 772) (SC).

related to medical issues can be freely instituted in Nigerian Conventional or National Courts and Subsequently in Arbitration.

3.1.2 Arbitration and Mediation Act 2023.

On May 26, 2023, the former president of the Federal Republic of Nigeria His Excellency President Muhammadu Buhari GCFR assented to the Arbitration and Mediation Act[64], 2023 which has now repealed the Arbitration and Conciliation Act 1988. This Act, which incorporates to a large extent the revised UNCITRAL Model Law of 2006,[65]seeks to promote the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.[66].

The Act introduced several novel provisions which remarkably modify the existing legislative arbitration framework and has the potential to transform the landscape of arbitration in Nigeria. The Act is made up of 92 sections and is divided into three parts which are part i for arbitration, part ii for mediation then part iii is for miscellaneous provisions. The following are the highlighted provisions are the innovative parts of the act.

1. Creation of a review mechanism for Arbitral awards

A significant innovation of the Act is its provision for the creation of an "Award Review Tribunal"[67] (the "ART"), an opt-in mechanism that gives the parties the option to specify in their agreement that arbitral awards may be reviewed by a second arbitral tribunal in the event that a party seeks to make application based on *section 55(3)* of the Act (grounds for application for setting aside an award).[68] The ART, constituted in the same way as the tribunal in the original

[64] 2023.
[65] 2006.
[66] Arbitration and Mediation Act 2023, s 1(1)
[67] Ibid, s56
[68] Ibid, s56(1)

arbitration, shall endeavor to give its decision within 60 days from the date of its constitution and during this time any enforcement proceedings must be stayed pending the decision of the ART.[69]

2. Provision of Interim measures:

Unlike the ACA, the Act contains comprehensive provisions regarding an arbitral tribunal's power to grant interim measures.[70] More significantly, the Act recognizes interim measures issued by the Arbitral tribunal as binding and further provides that they are enforceable upon application to the court, irrespective of the country in which it was issued.[71] This is of course subject to the grounds for the refusal of the recognition or enforcement of such interim measure specified in section 29 of the Act.

Further, the Act expressly empowers tribunals to order security for costs in appropriate circumstances.[72] Finally, the Act extends the power to order interim measures to the court. Hence, the court shall have the power to issue interim measures of protection for the purposes of and in relation to arbitration proceedings whose seat is Nigeria or another country as it has for the purpose of and in relation to proceedings in the courts.[73] It is worthy to note that any application for urgent interim measures from a competent court is not deemed to be an infringement or waiver of the arbitration agreement.[74]

3. Stay of Court proceedings:

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[69] Ibid, s56(2)

[70] Arbitration and Mediation Act 2023, ss 20-29
[71] Ibid, s28
[72] Ibid, s52
[73] Ibid, s19 However, the court will not grant an interim measure which is not compatible with the powers conferred on it see Ibid, s29(1)(b)(i)
[74] Ibid, s16(11)

The Act retains old section 4 (although in a modified form) and deletes *section 5* under the ACA, which left the decision to stay proceedings to the court's discretion and required the applicant to demonstrate its willingness to proceed with the arbitration. The Act now mandates the courts to stay proceedings commenced in breach of the arbitration agreement unless the court finds that

agreement is void, inoperative or incapable of being performed.[75] This pro-arbitration approach definitely has the potential to increase the attractiveness of Nigeria as a desirable arbitral seat.

4. Third-Party Funding:

Unlike the ACA, the Act sets out Third-Party funding ("TPF") provisions which apply to arbitrations in Nigeria and arbitration-related proceedings in Nigerian courts.14 The Act provides that an arbitral tribunal shall fix the costs of arbitration in the final award and such costs include the cost of obtaining Third-Party funding.[76] Furthermore, to guard against potential conflict of interest that may arise, the Act mandates that the identity and address of any third-party funder be disclosed before and/or during the arbitration. The Act also provides that where a respondent brings a security for costs application based on the disclosure of TPF, the tribunal may allow the funded party or its counsel to provide the tribunal with an affidavit confirming whether the funder has agreed to cover adverse costs orders. The affidavit is intended to form part of the information that the tribunal will consider in its decision on the security for cost application.[77]

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[75] Arbitration and Mediation Act, 2023,s5

[76] Ibid, s91 defines a "Third party funder" as any natural or legal person ho is not a party to the dispute but who enters into an agreement with a disputing party,an affiliate of that party, in order to finance part or all of the cost of the proceedings,either individually or as part of a selected range of cases.

[77] Ibid, s62

This is a very commendable innovation by the AMA as it would make it possible for many corporates to institute and defend arbitration claims despite the rising costs of arbitration.[78]

5. Emergency Arbitrators:

The Act allows for the appointment of an emergency arbitrator where a party requires urgent relief prior to the arbitral tribunal's constitution. Hence, a party that needs an urgent relief pursuant to a dispute may submit an application for the appointment of an emergency arbitrator to an arbitral institution designated by the parties or failing such designation, to the court.[79] The emergency arbitrator shall be appointed within two business days after the date the application is received.[80] A practical question that would have reasonably arisen from this would be whether the Nigerian Courts are well placed to select and appoint an emergency arbitrator within the specified deadline. However, the Act contemplates that attendant delays of the courts and makes up for such situation by providing that the 'court' in relation to appointment of emergency arbitrators means the "Chief Judge of any of the Courts referred to in this provision, sitting as a Judge in chambers." Finally, the decision of the emergency arbitrator shall be binding on the parties and can be enforced upon application to the court.[81]

6. Limitation period

the limitation period for the enforcement of awards now expressly excludes the period between the commencement of the arbitration and the date of the award in computing the time for the

[78] In both the 2015 and 2018 international arbitration surverys conducted by the School of International Arbitration at Queen Mary, University of London in partnership with White & Case,"costs" was seen as the worst characteristics ofarbitration.
[79] Arbitration and Mediation Act 2023,s16
[80] Ibid, s16(5)
[81] Ibid, s27(6)

commencement of enforcement proceedings.[82] This has laid to rest the controversy that arose from the court decision in the case of City Engineering Nigeria Limited v Federal Housing Authority,[83]and further reflects the judicial precedent in ***Messrs U. Maduka Ent. (Nig.) Ltd v B.P.E***[84] (albeit decided in light of Section 35(5) of the Lagos state Arbitration Law).

7. Consolidation, concurrent hearings, and joinders

The Act recognizes the agreement of parties to consolidate arbitral proceedings or hold concurrent hearings.[85] Hence, without the parties' authority, the arbitral tribunal may not be able to hold concurrent hearings or consolidate the proceedings.[86] Further, the Act gives the arbitral tribunal the power to allow the joinder of additional parties to the arbitration, provided that, prima facie, the additional party is bound by the underlying arbitration agreement.[87]

This is a laudable provision as efficiency in arbitration demands that multi-contract disputes should be consolidated before a single arbitral tribunal. More so, it reduces time and costs of resolving the dispute and prevents inconsistent/duplicative decisions on related claims and factual issues.[88]

8. Electronic communication as a form of arbitration agreement

The Act expressly provides that electronic communication would satisfy the requirement for an arbitration agreement to be in writing, provided the information contained therein is accessible so

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[82] Ibid, s34 (4)
[83] (SC 204\1992)[1997] 1.
[84] [2019]12NWLR (Pt.1687), 429.
[85] Ibid, s39(1).
[86] Ibid, s39(2).
[87] Ibid, s40
[88] Eunice Chan Swee EN (Drew & Napier), "Consolidation of Arbitral Proceeding and it's Ramifications on a Party's Right to Challenge the jurisdiction of the Tribunal and the Arbitral Award" https://arbitrationblog.kluwearbitration.com

as to be useable for subsequent reference.[89] The Act goes further to define "electronic communication" as "any communication that the parties make by means of data messages, that is, any information generated, sent, received or stored by electronic means".[90] Hence, unlike the ACA, the Act expressly recognizes email correspondence and other similar medium of communication that refers to the parties' agreement to submit their disputes to arbitration.

Other Arbitration-related changes introduced by the Act include;

a. Number of arbitrators: The Act now provides that where the number of arbitrators is unspecified, the default is a sole arbitrator, rather than three as it was under the ACA.

b. Arbitrator's Authority: The Act also provides that the authority of an arbitrator shall not be revoked by the death, bankruptcy, insolvency or other change in circumstances of the party who appointed the arbitrator.[91] This further buttresses the independence of an arbitrator from the appointing party. It is imperative to note that the provisions introduced by the Act has the potential to increase Nigeria's attractiveness as a major arbitration hub in Africa and even globally. However, most of these innovative provisions cater for the intricacies of international arbitration in modern times and is set to transform the landscape of arbitration in Nigeria

3.1.3 National Health Act

[89] Ibid, ss2(1) and 4(a)
[90] Ibid, s91
[91] Ibid, s4(2)

This is an act of the National Assembly was signed into by the then President of the Federal Republic of Nigeria His Excellency Dr Goodluck Jonathan in 2014 and its commencement date was on 31st day of October 2014. This act was proposed in 2004,[92] the development and enactment of a legal framework for health in Nigeria took close to a decade following the eventual signing into law of the National Health Bill on October 31, 2014. With this development, Nigeria after over 50 years as an independent country, now has a National Health Act 2014 (NHA) [93] which provides a legal framework for the regulation, development, and management of a National Health System and set standards for rendering health services in Nigeria and for related matters.

The NHA is made up of seven parts divided into various *sections 3* Each part contains fundamental provisions which if effectively and efficiently implemented will have a tremendous impact on health-care access and universal health coverage, health-care cost, quality and standards, practice by health-care providers, as well as patient care and health outcomes. The seven parts of the NHA are as follows: Part I being the Rules guiding the Responsibility for health and eligibility for health services and establishment of National Health System, Part II for the Health Establishments and Technologies, Part III covers the Rights and Obligations of Users and Healthcare Personnel, Part IV gives a systematic rules that governs the National Health Research and Information System, The provisions of Part V governs the Human Resources for Health, Part VI regulates the Control of Use of Blood, Blood Products, Tissue and Gametes in Humans, and Lastly, the provisions of Part VII is the Regulations and Miscellaneous Provisions which talks the powers of the Minister of Health to appoint committees and the delegation of powers and assignment of duty etc.

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[92] FA Obi, The National Health Bill: After Ten Years in making is an End in sight? Available from: https://www.nigeriahealthwatch,com/the-national-health-bill-after-ten-years-in-the-making-is-anend-in-sight/

[93] National Assembly National Health Act,2014: Explanatory Memorandum Available from: https://www.nassnig.org/document

However, in the case of Medical Negligence, Part III of the National Health Act provides for the rights and obligations of the users and health care personnel. It provides in section 20[94] that a health care provider, health worker or health establishment shall not refuse a person emergency medical treatment for any reason. This provision is in the benefit of a plaintiff and may cause a medical practitioner who chooses to practice defensive medicine at the time a patient is in a critical condition to be liable for that patient's wellbeing. Subsection (2) stipulates a fine of a hundred thousand naira (N100, 000) or six months' imprisonment or both for anyone in contravention of this section. Section 23[95] provides for the health provider to give the user i.e. patient full information of the state of his condition and any necessary treatment that may be employed. The only exception to doing so are cases where it may be shown that to give the user full disclosure would be detrimental to the health of the particular individual. Section 26 imposes upon the doctor, or health care provider, the duty of confidentiality, stating that all information relating to a user's health status, treatment or stay in a health establishment must be confidential. However, subsection (2) allows the information to be disclosed where;

c. The user consents to that disclosure in writing.

d. A court order or any law requires that disclosure.

e. In the case of a minor, with the request of the parent or guardian.

f. In the case of a person who is otherwise unable to grant consent, upon the request of a guardian or representative.

[94] National Health Act, 2014. No 8
[95] National Health Act, 2014. No 8

g. Non-disclosure presents a serious threat to public health.

In Conclusion, the National Health Act 2014 regulates Health Care System and Health Care providers, it's the Law which stipulates and enforces the duties and obligations and stipulates the punishments if its provisions are being contravened.

3.1.4 Medical and Dental Practitioners Act

This Act is divided into 4 Parts and 22 Sections which its provisions talks about the following; This act[96] establishes the Medical and Dental Council of Nigeria (the Council) and empowers it to determine the standards of knowledge and skills to be attained by persons seeking to become members of the medical or dental profession and also to review these standards from time to time. In this regard, the Council is responsible for the approval of courses, qualifications and the institutions intended for persons who wish to become doctors or dentists in Nigeria[97].

Therefore, the Act[98] also states the qualifications and requirements for full registration as a medical practitioner or a dental surgeon. These requirements are that:

i. A person has attended a training course approved by the Council;

ii. The course was conducted at an institution so approved by the Council;

iii. A person holds a certificate of experience issued pursuant to section 11[99].

[96] Medical and Dental Practitioners Act 2008 LFN CAP M8.
[97] Ibid, ss1(2)(a),9 and 10
[98] Ibid, s8
[99] Ibid

In this regard, the Council is empowered to prepare and maintain a register of medical practitioners in Nigeria[100] . To this end, the Council, through its Registrar (who may be a medical practitioner or a dental surgeon appointed by the Council) to prepare and maintain registers of the names, addresses, qualifications and such other particulars of persons who are entitled to practice medicine and dental surgery in Nigeria. Additionally, there is also an existence of the rules of professional conduct and in the event of a breach of the rights or rules of conduct, the means of seeking redress and procedure for disciplinary action are also set out. In this vein, the Medical and Dental Council of Nigeria has and exercises disciplinary powers over erring medical practitioners or dental surgeons in Nigeria according to the provisions of the Medical and Dental Practitioners Act[101]. The circumstances under which the disciplinary powers of the Council are as follows:

i. Where a registered practitioner is adjudged by the Disciplinary Tribunal to be guilty of infamous conduct in a professional respect;

ii. Where a registered practitioner is convicted by a law court or tribunal of competent jurisdiction in Nigeria, or

iii. Where a person has been fraudulently registered. [Section 16(1) of the Act][102].

iv.

The provisions of this Act Also stipulates the other duties of the Medical and Dental Council of Nigeria which includes involves the investigation of cases of professional misconduct.

[100]Ibid, s6(2)
[101] Ibid, s16
[102] Ibid, s16(1)

According to the provisions of the Medical and Dental Practitioners[103] Act and the Code of Medical Ethics[104] in Nigeria, it is the Medical and Dental Practitioners Investigation Panel ('the Panel') that is empowered to conduct preliminary investigation into any allegation of infamous conduct in a professional respect or case where it is alleged that a registered person has misbehaved in his capacity as a medical practitioner or dental surgeon. This power also extends to when a medical practitioner or dental surgeon is the subject of proceedings before the Disciplinary Tribunal. Therefore, once the Panel concludes its investigation and finds that there is substance in the allegation against a practitioner, the matter is remitted to the Medical and Dental Practitioners Disciplinary Tribunal for trial. During the trial, the affected practitioner is given to opportunity defend his actions and conduct. This is in fulfillment of the requirements of fair hearing which is constitutionally guaranteed.

It is the Medical and Dental Practitioners Disciplinary Tribunal ('the Tribunal') that has the duty of considering and determining any case referred to it by the Panel and any other case which the Tribunal has cognizance under the Act[105] .Upon trial and finding of a practitioner guilty of an infamous conduct in a professional respect as contained in the charge preferred against such practitioner, the Tribunal can (in accordance with the Code)[106] impose any of the following statutory penalties depending on the gravity of the offence and the attitude of the practitioner before and during the investigation and/or trial:

i. Order the Registrar to strike the person's name off the relevant register or registers.

[103] Ibid, s15(3)
[104] Rule 25
[105] Medical and Dental Practitioners Act, Cap M8 Laws of Federation of Nigeria 2004, s15(1)
[106] Medical Ethics, Rule 25

ii. Suspend the person from practice for a period specified in the directive, not exceeding six months;

iii. Admonish the person.

It is important to state the policy considerations underpinning the conduct of professional disciplinary proceedings as captured in ***Dr. Milam v. Medical and Dental Practitioners Investigation Panel & Anor.***[107]. In Milam's case, the Court of Appeal, Lagos Division per Tijjani Abubakar, J.C.A. stated that the conduct of professional disciplinary proceedings is underpinned by two major policy considerations; the first being to internally regulate its affairs as a profession; and the second being that the purpose of the disciplinary proceedings is not about punishment or retribution, but protection.

The Medical and Dental Practitioners Act establishes the Medical and Dental Council in which bodies such Medical and Dental investigative Panel and Medical and Dental Tribunal and systematically states their duties.

3.2 INSITUTIONAL FRAMEWORKS

3.2.1 The Nigerian Medical Association

This is the largest medical association in the West African sub-region with over 40,000 members from 36 state branches and the branch from the federal capital territory with about 19,000 in Diaspora. 70% of doctors practice in urban areas where only 30% of the population resides[108].

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[107] [2018] LPELR-45539.
[108] https://thenma.ng/

The NMA traces its roots to 1951 when the British Medical Association formed a branch in Nigeria. Professor O. A. Ajose was elected the first President, and Dr. Brian S. Jones, the Honorary Secretary[109]. Despite initial challenges in establishing branches nationwide and facing government hostility, the Association held its first countrywide Annual General Meeting in 1952. Although the Association is involved in many of the government's activities, it is consulted formally by the government only on an ad-hoc' basis. The Association nominates eleven members of the Medical & Dental Council of Nigeria which regulates the practice of medicine & dentistry in Nigeria and the curricula of its medical schools[110].

The NMA is at present involved in influencing health policy formulation in an ad hoc manner. This is done by making unsolicited recommendations to government on various health issues and also by making-inputs, whenever invited, to some of the national committee meetings on policy formulations. Their conference and scientific session holds from 29th April – 6th May at Abuja every year[111]. The Nigerian Medical Association is Umbrella body of all medical practitioners in Nigeria and they are one of the institutions regulating the conduct of medical practitioners in Nigeria. The Nigerian Medical Association regulate the conducts by enacting bye laws during their annual conference

3.2.2 The Nigeria Institute of Chartered Arbitrators (NICArb)

It is the premier arbitration institute in Nigeria founded in 1979 under the leadership of former Attorney General of Nigeria and former judge of the World Court at The Hague, Judge Bola Ajibola, SAN, KBE and duly incorporated in 1988 under the Companies Act as a legal entity

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[109] Ibid

[110] Ibid.

[111] https://thenma.ng/

Limited by Guarantee[112]. Since 1979, the Nigerian Institute has been at the forefront of promoting the domestication, knowledge and practice of arbitration and ADR in Nigeria and has gained a reputation as the preferred appointing authority and arbitration handling institution for a broad spectrum of commercial disputants[113]. Currently, the institute have a national presence through state branches headed by Chartered Arbitrators in Abuja, Anambra, Akwa Ibom/Cross Rivers, Bayelsa, Delta, Edo, Enugu, Imo, Kano/Kaduna, and Osun. Also has Sectorial Committees on Aviation and Transportation, Banking and Finance, Construction and Real Estate, Energy and Power, Government and Privatization, Manufacturing, Maritime and Admiralty, Public Private Partnership and Concession and Telecommunication. These state branches are headed by Fellows of the Institute[114]. The primary strategies for the promotion of ADR adopted by the Nigerian Institute include advocacy, capacity building, research, arbitration referral services, strategic partnership and programme development. Professionals across the nation benefits from trainings, seminars, conferences and workshops on arbitration, mediation and other forms of ADR offered by the Nigerian Institute of Chartered Arbitrators[115].

Nigerian Institute of Chartered Arbitrators is the primary institution who are in charge of the production of the constituents of an arbitral panel that would preside over cases of Arbitration cases including that of a medical negligence if the parties decide to choose institutional arbitration.

3.2.4 The International Centre for Arbitration and Mediation Abuja (ICAMA)

[112] <https://www.nicarb.org/about.html> accessed on
[113] Ibid.
[114] Ibid.
[115] https://www.nicarb.org/about.html

This institution is located at the heart of Abuja the Capital of Nigeria, and it is one of the world's most Preferred international centers for dispute resolution[116].

The center, which was officially launched in May 2012 offers assistance, support services and excellent facilities for training, meeting, and hearings of ad-hoc and institutional arbitrations.

The center provides for appointment of seasoned and experienced arbitrators from the center list of arbitrators/mediators where the need arises and in a situation where parties are unable to nominate arbitrators by themselves[117]. ICAMA can administer institutional arbitrations under any rules as expressed by the agreement of the parties4. In the absence of this, the center will adopt the UNCITRAL rules as amended[118]. The areas of specialty for International Centers for Arbitration and Mediation Abuja (ICAMA) specializes on International Commercial Disputes, International Investment Disputes

International Arbitration services offered in Africa includes the following;

a) Appointment administration of Arbitrators/Mediators under Own Rules

b) Appointment of Authority for ad hoc arbitrations.

c) Case Administration for ad hoc arbitrations.

d) Advise on award enforcement

The international center for Arbitration and Mediation is a center in Nigeria established in order to resolve many Arbitration issues including issues of medical negligence particularly if the parties

[116] Ibid
[117] Ibid.
[118] Ibid.

expressly stated that ICAMA would be arbitration institution that would handle any disputes that would arise between them.

3.2.5 The Medical and Dental Council of Nigeria (MDCN)

The Medical and Dental Council of Nigeria is a professional health regulatory agency for the professions of Medicine, Dentistry and Alternative Medicine in Nigeria[119].

The MDCN, since its establishment in 1963 has had a rewarding and growth-filled adventure, in its regulatory activities. A testament to this is the large number of practitioners that have been produced by Nigerian medical and dental training institutions who are providing excellent services in Nigeria and many other countries around the world. This makes the MDCN one of the foremost medical regulatory authorities in Africa. Across all of their zonal offices and at the headquarters in Abuja, committed to the mission and focused on providing exceptional regulatory services.

The Medical and Dental Council of Nigeria is a regulatory body established by the Federal Government of Nigeria to oversee the practice of medicine and dentistry in the country. MDCN's primary objective is to ensure that healthcare professionals, including dentists, meet the required standards of education, training, and conduct[120].

MDCN's Role in the Regulation of Medical Care

The Medical and Dental Council of Nigeria, plays a very crucial role in the regulation of healthcare and medical care in Nigeria, this role extends to the rules and bases of medical arbitration upon any occurring medical negligence

[119] https://www.mdcn.gov.ng/
[120] https://www.mdcn.gov.ng/

i. Licensure: MDCN issues licenses to dental professionals, ensuring they meet the necessary qualifications and training.

ii. Accreditation: MDCN accredits dental institutions and programs, ensuring they meet international standards.

iii. Practice Guidelines: MDCN establishes guidelines for dental practice, including ethical conduct and standards of care.

iv. Disciplinary Actions: MDCN investigates and takes disciplinary actions against dental professionals who violate ethical standards or engage in malpractice. The guidelines established or promulgated by Medical and Dental Council of Nigeria are one of the yardsticks or the regulations that would determine where the act of Negligence has been committed by a Medical Practitioner either before an Arbitration Panel or a Conventional or National Courts[121].

3.2.5 National Courts

The great paradox of arbitration is that it seeks the co-operation of the public authorities from which it wants to free itself. [122] National courts become involved in arbitration for a whole host of reasons, but do so primarily because national laws are permissive and parties invite or encourage them to do so.[123] Parties in arbitration want a prompt, less expensive and final resolution of the dispute, and also want to ensure that the arbitral process is just and impartial.[124] While it is argued that arbitration must be free from courts, in order to be effective, it is also accepted that arbitration

[121]Ibid
[122] J Paulsson, Three Dimensions, LSE Legal Studies Working Paper No. 12.2010.
[123] C Okezie, Judicial Supervision of Commerical Arbitration, *Arbitration International* [1999] (15)
[124] Ibid

needs the support of national courts to be effective.[125]Flowing from this, this interference takes place at the beginning of the arbitration, during arbitration process and at the end of the arbitral process. Consequently, this provision confers jurisdiction on the courts in respect of matters such as: stay of proceedings, revocation of arbitration agreement, appointment of arbitrator, attendance of witnesses, setting aside of award, remission of an award, enforcement of award and refusal of enforcement of award. The extent, to which court should supervise the arbitral process, if at all, must depend on the essential nature of arbitration. However, Bernard in his theoretical writing, held that an Arbitration agreement and arbitral awards are separate, and the later should be regarded as akin to a court judgment.[126]

The involvement of courts in modern commercial arbitration generally begins even before the arbitral tribunal is established, when the courts are used to protect evidence or the res, to avoid damage.[127]Prior to the establishment of the arbitral tribunal, courts become involved where a party initiates proceedings to challenge the validity of the arbitration agreement; where one party institutes court proceedings despite, and perhaps with the intention of avoiding, the agreement to arbitrate; or where one party needs urgent protection that cannot await the appointment of the tribunal. *Section 1(7)*[128] stipulates the seven powers of the courts in Arbitration such as; The courts then enforce arbitration agreements for the arbitral process to start; during the pendency of the arbitration itself, it issues interim orders and recognizes and enforces awards at the end of arbitration.

[125] J Redfern, Jurisdiction Denied:The Pyramid Collapse, *International Commercial Arbitration* [1986] (15)
[126] JDM Lew, 'Applicable Law in International Commercial Arbitration' [1978]
[127] Ibid

[128] Arbitration and Mediation Act, No 11 Laws of the Federation of Nigeria 2023

It is important to note the Court can also revoke an arbitration agreement, in line with *Section 3* of the Act,[129] it provides that notwithstanding the provisions of the law, an arbitration agreement shall be irrevocable except by the leave of court when the judge finds it void, in operative and incapable to be performed[130] It is pertinent to state that the private nature of arbitration does not oust jurisdiction of the courts, all that the agreement does is to postpone the right of access to court.[131] Since, the parties to a contract are allowed within the law to regulate their rights and liabilities themselves,[132] all that the court is required to do is to give effect to the intention of the parties as it is expressed in and by their contract.[133]This calls for two things from the courts. First, it must determine whether an arbitration agreement is valid and then whether to enforce a valid arbitration agreement which has not been mutually abandoned.[134] Upon medical Once parties enter into a valid arbitration agreement, one of them cannot unilaterally revoke it, he must apply to the court for revocation.

The National court plays a crucial role in the arbitrability of medical negligence, this judicial involvement spans through revocation of arbitral awards, and setting aside of arbitral awards. The National court also exercises the power to grant interim measures of protection, appointment and removal of arbitrator, attendance of witnesses, production of documents, remission of award, recognition and enforcement of awards.

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[129] Ibid
[130] *Scheep v. MV Araz* [2000] 15 NWLR (Pt 691) 622, *Obembe v. Wemabod Estates* [1977]5 SC 115.
[131] *City Eng (Nig) Ltd v. Federal Housing Authority* [1997] 9 NWLR (Pt 520) 224.
[132] *Gott v. Gandy* 2 E&B 845 , p.845
[133] *Sonar (Nig) Ltd v. Nordwind* [1987] 4NWLR (PT.66) 520 .
[134] *Kurubo v. Zach Motison (Nig.) Ltd* [1992] 5NWLR (Pt.239)102.

CHAPTER FOUR

A CRITICAL ANALYSIS OF LEGAL ISSUES AND CONCERNS OF ARBITRABILITY OF MEDICAL NEGLIGENCE

4.1 Negating Factors of the Arbitrability of Medical Negligence

4.1.1 Conditions for the Arbitrability of Medical Negligence disputes in Nigeria

Before outlining the negating factors of the Arbitrability of medical negligence disputes, we have to clearly discuss the determining factors of the Arbitrability of Medical Negligence in Nigeria. This clearly explains whether a particular subject matter can be resolved through arbitration rather than litigation in court. In Nigerian jurisdiction, not all disputes are arbitrable some are reserved strictly for the purview of National courts due to public policy, criminal elements, or statutory restrictions.

In cases of medical negligence in Nigerian Arbitration Jurisprudence, arbitrability of medical negligence has not been fully outlined. It depends on the nature of the claim, the parties involved, and public interest considerations.

Medical negligence claims, involving civil wrongs, and breach of contractual agreement, which may have caused personal injury, may be arbitrable if:

a. The dispute is purely or categorically private between a patient and a healthcare provider.
b. There must be a contractual or commercial and an ethical relationship between the healthcare provider and the patient according to *Section 1(5)* of the Arbitration and Mediation act.

It must be emphasized that there is a valid contract existing in every physician patient relationship.[135] Care must however be taken in the analysis of medical contracts to the effect that there are two types of medical service contracts. The first is the general contract which is automatically formed from the physician/patient relationship. This stems from the fact that whenever a patient approaches a medical provider, fills and signs an admission form, a valid contract is effected and both parties have certain obligations which they are bound by.[136] Additionally, these medical service agreements contain the classical trinity requirements of offer, acceptance and consideration.[137] An implied term of such contracts is that doctor will exercise the reasonable skill and care of a practitioner in his or her field.[138] Should a practitioner fail in his duty and the patient suffer damages, the practitioner will be bound to compensate the patient for the damages caused by his breach.[139] The second type of medical service contract normally occurs where a person approaches a medical provider for treatment in anticipation of particular results.[140] In this situation , a patient who is disappointed with the results of a surgery or other medical procedure may sue for 'breach of promise' to achieve anticipated results.[141] This was the position

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[135] See A Shaikh, 'A Doctor–Patients Relationships: The Distinction Between Contractual and Tortuous Liability' (February 2015) at www.lawoctupus.com/the ACA1988 demike/doctor-patient-relationshipsthe-distiction=between-contractual-and-tortiousliability/ where he states that "there are three dimensions to a doctor patient relationship, the first being a contractual dimension.

[136] D.Giensen and Fahrenhorst, 'Civil Liability Arising from Medical care– Principles and Trends' *International Legal Practice* [1984][9]

[137] *Horn v Cooke*, 325 NW 2d 558, 560 (Mich Ct App 1982)

[138] Ibid.

[139] Ibid.

[140] *Sullivan v O'Connor*, 296 NE 2d 183.

[141] M Woldu, 'Medical Liability in the Eritrean Context' *Journal of Law and Development* [2016] (1)(2) https://www.ajol.info/index.php/jema/article/viewfile/52676/41282 51 Sullivan v O'Connor, 296 NE 2d 183.

in ***Sullivan v O' Connor***[142] where a lady entered into a contract with a medical doctor to perform plastic surgery on her nose and thereby enhance her beauty. She subsequently alleged that he breached the contract by failing to achieve the desired results. The jury found the medical doctor liable for breach of contract. Therefore, medical services can validly qualify as contractual matters in Nigeria. So as for the legal relationship that stemmed from commercial transaction a medical service contract can qualify as commercial transactions[143].

Under the Arbitration and Mediation Act, 2023, a "commercial transaction" is defined broadly to cover a wide range of dealings that can be subjected to arbitration. According to *Section 91*[144] "Commercial" includes all relationships of a commercial nature whether contractual or not including any transaction for the supply or exchange of goods or services; distribution agreements; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint ventures and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail, or road. "The definition is inclusive non-exhaustive and of a generic concept. It is therefore probable to bring medical services within the precincts of commercial transactions. The reason is that patients are seen as consumers of medical services,[145] and if they be consumers of services, they can rightly be seen as engaged in commercial transactions. Although care should be taken because for ethical reasons, medical providers do not like to be

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[142] *Sullivan v O'Connor*, 296 NE 2d 183.

[143] Mark A, Hall & Carl E Schneider, 'Patients as Consumers: Courts, Contracts, and the New Medical Marketplace' *Michigan Law Review* at https://repository.law.umich.edu/mlr/vol106/iss4/2 [2008](106)(643) (647)
[144] AMA 2023.
[145] John Fabre, 'Medicine as a profession: Hip, Hip, Hippocrates: extracts from The Hippocratic *Doctor' British Medical Journal* [1997](315),

regarded as “selling” or “trading” their services to patients.[146] Perhaps this accounts for why doctors do not normally discuss charges with patients. In spite of this, however, we must return to the stark and harsh reality that medical services are consumer contracts and thus form commercial transaction. If medical service agreements can qualify as contacts and commercial transactions, they are also capable of arbitration. It covers medical services provided in a hospital–patient relationship, especially when rendered for a fee, thus supporting the argument that medical negligence claims (contract-based) may fall within arbitrable commercial transactions, where there is an existence of an arbitration agreement (explicit or incorporated into a contract for medical services), and the claim has to be expressly all about compensation, not criminal liability.

4.1.2 Reasons for the use of Arbitration in cases of medical negligence in Nigeria

The following are the reasons for Referring Cases of Medical Negligence to Arbitration in Nigeria

a. Confidentiality:

Arbitration proceedings are done in private unless litigation where it is done in public where ingress and egress are not restricted, thereby protecting the reputations of both patients and healthcare providers. Unlike court cases, sensitive medical issues and problems are not exposed to public scrutiny.

b. Speedy Resolution:

In Nigerian Jurisdiction, Court cases often suffer delays due to congested dockets. Arbitration offers a faster alternative, which is very imperative in emotional and time-sensitive medical

[146] Ibid.

disputes and issues of medical negligence being a sensitive one in which parties would require faster means of dispute resolution.

c. Cost-Effectiveness:

Though arbitration has upfront costs as provided in the Arbitration and Mediation[147] Act 2023 especially in institutional arbitration (e.g., arbitrator fees), however despite the existence of these upfront fees, it may ultimately be cheaper than prolonged litigation.

d. Flexibility of Procedure:

The principle of party autonomy provides that parties of the dispute have a high degree of control over the process which included selection of arbitrators, choice of both the substantive and procedural law governing the arbitration agreement and the Arbitration proceeding (Lexi Aibtri), venue for the arbitration proceeding including the language of the Arbitration proceeding. This is the direct opposite of the process of National Court of Conventional Litigation in which there are already prescribed rules in which everyone including the judges, the parties and their legal practitioners are expected to strictly adhere to. This adaptability suits the technical and emotional nature of medical negligence cases.

e. Expert Determination

The cases of medical negligence are sensitive and requires a critical expert analysis and opinion in deciding such disputes which judges in National Courts lack in great degree, So Arbitrators with medical and legal expertise can be appointed, leading to better-informed decisions than a general court may offer.

f. Reduced Adversarial Tension:

[147] Section 50

Despite being a semi adversarial mode of Alternative dispute resolution mechanism, Arbitration is less combative, making it easier to preserve doctor-patient or institutional relationships post-dispute.

g. Enforceability and Finality of Awards:

Awards in arbitration are final, binding and enforceable under the Arbitration and Mediation Act, 2023.[148]

Negating Factors of the Arbitrability of Medical Negligence disputes in Nigeria

1. Nature of the dispute:

Under Nigerian Arbitration Jurisprudence, there are certain disputes that cannot be referred to Arbitration and examples of such disputes are

a. Crimes:

A major determinant of arbitrability in Nigeria is public policy. Thus, public policy considerations have been carefully used to exclude criminal matters from the purview of arbitration. This was the decision of the court in ***Kano State Urban Development Board v Fanz Construction CO,***[149] public policy categorically means community sense and common conscience that is extended, applied and applicable throughout the State to matters of public morals, health, safety welfare**.** This principle was clearly elucidated in ***BJ Exports & Chemical Processing Co v Kaduna Refining and Petrochemical Co,***[150] where the court decided that fraud is not arbitrable in Nigeria because

[148] S, 52(1).
[149] [1990] 4 NWLR (Pt.142) 1 (SC).
[150] [2003] 13 NWLR (Pt.837) 382 (SC).

the case was considered a criminal matter and the enforcement of the award would be contrary to public policy.

b. Certain Tortuous Claims:

Apart from criminal matters, it appears that certain matters involving tortuous liability arising from medical negligence claims may not be arbitrable on public policy grounds due to their similarity with criminal sanctions. This may create difficulties in referring medical negligence claims to arbitration for the reason that the tort law was created with the hope of influencing the quality of care given to members of the society and ensure that a minimal standard is applied by healthcare providers. This explains why the tort law uses monetary sanctions which create a form of deterrent effect in a similar fashion to that created by criminal sanctions. The fear is that the complete privatization of the process may arise completely as a result of referring certain medical negligence cases with tortuous claims to arbitration may eliminate this deterrent effect.

c. Public policy concerns:

Claims involving certain issues such as criminal negligence or broader public interest may be non-arbitrable and awards awarded can be set aside by public policy according to the Arbitration and mediation act 2023[151]. Inasmuch as the courts would normally enforce an arbitration clause arising from a valid contract, medical service agreements may not be free from the net of public policy. The courts have on the grounds of public policy refused to enforce contracts for medical services on grounds that if such agreements are enforced, physicians will be hesitant to offer therapeutic reassurances to their patients. More so, when there is a contract for medical services, a court may look to the circumstances surrounding the signing of the agreement. In this regard contracts for

[151] s55(3)(b).

medical services are highly susceptible to being defined as contracts of adhesion because persons in dire need of medical care are often not in a position of equal bargaining power. A contract of adhesion is one where : there exists an unequal bargaining power; the stronger party offers only pre-set terms; and no bargaining for the desired services occurs. The weaker party must accept the pre-set terms or go without the desired services or product. Contracts for medical services are highly susceptible to being defined as contracts of adhesion because persons in need of medical care are often not in a position of equal bargaining power.

Many patients and even some providers lack knowledge of arbitration as an option. Additionally, the absence of specialized medical arbitration panels may discourage its use.

While medical negligence may be arbitrable under certain circumstances, However, it is important to note that these negating factors present serious limitations in practice within the Nigerian legal system. Courts remain the dominant forum for resolving such disputes but however nothing has resolved this issue.

4.2 **Medical Errors, prevention and arbitrability.**

Human errors in health-care delivery have always been a pertinent challenge since the Hippocratic dictum "first, do no harm." Medical errors are human errors in the process of care delivery and is a significant cause of morbidity and mortality among patients with grave consequences for family and public health.[152] In the old days of medicine, it was not well recognized that patients actually die from the care that they receive rather than the disease for which they seek care. In the now, a

[152] AK Jha, Larizgoitia, IC.Audera-Lopez, N Prasopa-Plaizier, H Wters and DW Bates, 'The global burden of unsafe medical care:Analytic modeling of observational studies' *BMJ QualSaf* [2013] 22, 15.

strong body of scientific literature reports the role of medical errors in patient death[153] and is one of the top 10 medical causes of disability worldwide constituting about 23 million disability-adjusted life years.[154]

Medical errors have more recently been recognized as a serious public health problem, reported as the third leading cause of death in developed countries such as the US.[155] However, because medical errors occasion through misdiagnosis and medication errors that can result in various outcomes such as near-miss, injury, or no harm. Estimates of the incidence of medical errors vary widely in studies. However, research studies which have carefully analyzed had shown that the patients and families that considered litigation for medical errors are likely those who were more dissatisfied with the explanation of the diagnosis which they received from the medical practitioner.[156] Admittedly, medical errors do not necessarily constitute unethical behavior but failure to disclose error may. While patients and the public support disclosure of medical errors, physicians also indicated support for error disclosure but often do not disclose error. Professional and ethical guidelines, and patient safety organizations[157] recommends disclosure of medical errors and the recent quality of care in health-care settings link disclosure of unexpected outcomes to hospital accreditation.

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[153] MA Makary, M Daniel, 'Medical errors-the third leading cause of death in the US' *BMJ Qual Saf* [2013] 22 801-15.

[154] JT James 'A new, evidence-based estimate of patient harms associated with hospital care' *J Patient Saf* [2013] 9(3):122-8.

[155] V Sameera, A Bindra, and GP Rath. 'Human errors and their prevention in healthcare' *J Anaesthesiol Clin Pharmacol*. [2021]37(3):328-335.

[156] S Ellahham, 'The Domino Effect of Medical Errors' *Am J Med Qual.* [2019] 34(4) 412-413

[157] Ibid.

In general, medical error refers to any type of error, event, mistake, mishap, incident, accident, or deviation from process of care regardless of whether or not it results in patient harm or death.[158] The causes and risk factors of medical errors could be health professional-, patient-, and system-related. Great number of medical errors result from human and systematic errors especially poorly designed and articulated process of care and incompetent medical practitioners. Although other healthcare professional[159] commit health-care errors research studies have indicated a geometric rise in the frequencies of medical errors with overwhelming majority of this increase being physician-related.

The Institute of Medicine Committee on Quality Health Care in the United States (IOM) also defined a medical error as the failure to complete the intended plan of action or implementation of the wrong plan to achieve an intended outcome. Other experts characterized medical errors as deviations from the standard care process that may or may not result in patient injury.

Categories of Medical Errors

There are two categories of Medical Errors

1. Active Errors

2. Latent Errors.

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[158] J Martin-Delgad, A Martínez-García, JM Aranaz, JL Valencia-Martín and JJ Mira, 'How Much of Root Cause Analysis Translates into Improved Patient Safety: A Systematic Review' *Med Princ Pract.* [2020] 29(6) 524-531

[159] JT James, 'A new, evidence-based estimate of patient harms associated with hospital care' *J Patient Saf.* 2013] 9(3)

An active error is a specific event that causes patient harm and which directly involves the healthcare professionals providing some aspect of patient care, such as operating on the wrong eye. Active Errors can also referred to as Doctor induced error. A latent error consists of intrinsic failures within the patient care process (eg, faulty equipment, ineffective organizational structure, or poor system design). These errors may go unnoticed for a long time without adverse effects. Latent errors are typically "accidents waiting to happen." An example of a latent error is a malfunctioning ventilator machine. However, the clinician's failure to check the device before use is an active error[160]. it can be also called System induced error. It is imperative to note that every type of medical error must belong to either of the two categories.

Types of Medical Errors

1. Surgical Errors:

These can be defined as errors caused in the cause of a surgical procedure or operation. Errors in surgery have the highest risk of severe patient injury and death. Intraoperative errors are estimated to be the primary issue in 75% of malpractice cases involving surgeons. Surgical errors involving the wrong site, patient, or procedure which should have never occur. Investigations into the factors that led to these types of surgical errors have demonstrated that common causes include clinician factors (eg, feeling rushed, distractions, and fatigue), miscommunication, changing or inadequate staffing, organizational factors (eg, discarding specimens as waste and not labeling specimens), medical record issues, and cognitive error[161]

2. Diagnostic Errors:

[160] V Sameera, A Bindra, and Gp Rath. 'Human errors and their prevention in healthcare' *J Anaesthesiol Clin Pharmacol.* [2021] 37(3) 328-335.
[161] CH Vancheron,A Acker,M Autran and 2 ors, 'Insurance claims for Wrong side,Wrong Organ,Wrong Procedure or Wrong Person Surgical Errors:A Retrospective Study for 10 years'

The National Academy of Medicine defines a diagnostic error as "the failure to establish an accurate and timely explanation of a patient's health problems or to communicate that explanation to the patient," therefore from the above definition, delayed or missed diagnoses constitute and are considered errors as well.

3. Medication Errors:

Because of the complexities and several components involved and associated with patient medications (eg, prescribing, dispensing, dosing, and administering), errors can occur in any of those areas. However, many medication errors like other types of medical errors are considered preventable. Common medication errors include overriding medication-use safeguards, mistakenly administering a similar-sounding medication, or using out-of-date medications.

4. Device and Equipment Errors:

There is a general notion among Health professionals that technology will improve healthcare efficiency, lower cost, increase quality, and promote safety; however, despite these benefits,these same technologies may also introduce errors and adverse events. Millions of healthcare providers use approximately 5000 types of medical devices worldwide, so device-related errors are inevitable. Medical equipment design flaws, mishandling, user error, and malfunction are common causes of medical errors. In addition, a significant number of medical devices have been surgically implanted in patients (eg, pacemakers, defibrillators, and nerve and brain stimulators), which may malfunction and result in life-threatening complications. Equipment errors can be due to device differences between manufacturers, inadequate testing and maintenance, poor design, and poor maintenance. Errors involving tube and catheter connections (eg, using catheters for unintended purposes, running the wrong line through a pump, and misplacing feeding tubes into the lung) are also common. These adverse events can have life-threatening effects if a misconnection is not

detected and corrected early and properly. To complicate the situation further, medications and food supplements are often delivered via these routes, and placement errors can result in administration or omission mistakes.

5. Hospital-Acquired Infection:

Healthcare-related infections are considered a failure of the system. As many as 1 in 20 hospitalized patients may acquire a healthcare-related infection, increasing complications and the length and cost of the hospital stay. Common causes of hospital-acquired infections include failure to practice basic hand hygiene and sanitation, poor technique in placing indwelling urinary and vascular catheters due to poor disposal system which is the main problem in Nigerian Health care institutions particularly Government owned. Subsequently, the most prevalent infections are catheter-associated urinary tract infections, surgical site infections, hospital-acquired pneumonia, central line-associated sepsis, and care-related skin and soft tissue infections[162].

6. Poor Communication:

Optimal inter professional communication, as well as with patients, is essential for patient care. Therefore, communication errors commonly and categorically result in adverse events. Reasons for impaired communication include disruptive patient behavior, environmental distractions (eg, cell phones and pagers), cultural differences, hierarchy issues, personality differences, language barriers, and socioeconomic variables, such as education and literacy.

Prevention of Medical Errors in Nigeria

Preventing medical errors is critical and imperative in improvement of patient safety, reduction of avoidable harm, and the enhancement of public trust in the Nigerian healthcare system. In Nigeria,

[162] TL Rodziewicz,B Houseman,S Vaqar & ors 'Medical Error Reduction and Prevention'

prevention efforts should be swift, systemic and professional, involving effective statue-laws, policies, Critical training, and culture change. The following are the preventive measures that can effectively reduce the medical errors;

1. Strengthening of Nigerian Healthcare Systems: Strengthening of the Nigerian Healthcare can be done in various ways which includes
    a. Standardized clinical protocols and guidelines: Ensure consistency in treatment by the creation of an effective standard of patient treatment in Nigerian Health care institutions.
    b. Electronic Medical Records (EMR): The Creation of an Electronic Medical Record would greatly reduce documentation errors and improve and increase effectiveness in communication.
    c. Adequate staffing and equipment: Employment of proper, qualified and well-trained staff and procurement of cutting-edge technology equipment's would reduce and prevent fatigue-related mistakes and ensure proper care delivery.
2. Continuous Training and Education

Regular Continuing Medical Education (CME) for all healthcare professionals is imperative in order for the employees to

a. Train in error recognition, reporting, and management.

b. Promotion skills in communication, ethics, and decision-making.

3. Creation of an Error Reporting and Monitoring Systems:

The Establishment of well elaborate national medical error reporting system with an effective legal protection for whistleblowers. Encouragement of non-punitive reporting culture

to learn from mistakes, not hide them.

4. Drafting and implementation of Patient Safety Laws and Policies

Implementation and the enforcement of legal frameworks mandating:

a. Patient rights
b. Informed consent
c. Mandatory hospital accreditation and inspection
d. Enforcement of penalties for systemic negligence.

5. Promoting a Culture of Accountability: Developing a culture of accountability would foster the Encouragement of hospital leadership to prioritize safety over blame, and effective Use of peer reviews, audits, and risk assessments to monitor compliance.
6. Patients Education and Sensitization: Proper Patient Education and Sensitization would properly
    d. Proper Education of patients about their rights and responsibilities.
    e. Proper Involvement of persons in care decisions to prevent misunderstandings.
    f. Proper Promotion of health literacy to reduce miscommunication.

The Prevention of medical errors in Nigeria requires a precise multi-layered approach involving certain legal approaches such as legal reforms, medical education, hospital management, and patient participation. A proactive and accountable health system is essential for long-term change.

The Arbitrability of Medical Errors in Nigeria

While arbitration can enhance justice but caution must be strictly observed in order to ensure that patient rights are not undermined by poorly drafted arbitration agreement or inequality of bargaining power.

4.3 Patients Right

Patients' rights were formalized in 1948 after the Second World War. The Universal Declaration of Human Rights recognizes "the inherent dignity" and the "equal and unalienable rights of all members of the human family", and it is on the basis of this concept of the person, and the fundamental dignity and equality of all human beings, that the kennel and notion of patient rights was developed. In other words, what is owed to the patient as a human being, by physicians, by the health care providers and by the state, took shape in large part; thanks to this understanding of the basic rights of the person. Patients' rights vary in different countries and in different jurisdictions, often depending upon prevailing cultural and social norms. Different models of the patient-physician relationship which can also represent the citizen-state relationship have been developed, and these have informed the particular rights to which patients are entitled. In North America and Europe, for instance, there are at least four models which categorically depict this relationship: the paternalistic model, the informative model, the interpretive model, and the deliberative model.

Each of these models gives different suggestions about professional obligations of the physician toward the patient. For instance, in the paternalistic model, the best interests of the patient as judged by the clinical expert are valued above the provision of comprehensive medical information and decision-making power to the patient. The informative model, by contrast, sees the patient as a consumer who is in the est position to judge what is in his/her own interest, and thus views the medical practitioner as chiefly a provider of information.

In the Interpretative Model, the physician acts like a counsellor whose role is to elucidate and interpret the patient's values, and then to assist him in determining the medical interventions which would best realize the specified values[163].

In the Deliberative Model, the physician takes a much more active role in the collaborative dynamic. He presumes that the patient's values are open to development and revision through moral discussion. He articulates and persuades the patient of the most admirable values. Like a teacher he explains what course of action in his judgment is not only “medically indicated” (Informative Model) but also most noble. Thus, the physician presents his medical and moral judgment up front in the discussion and uses his skills of persuasion based on clinical experience and firm opinion, yet ultimately he leaves the final decision to the patient who is in the best position to judge what is in his/her own interest, and thus views the medical practitioner as chiefly a provider of information[164].

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[163] S Iwuagwu, ‘The Rights to Health and Violation of Patient’s Rights: A desk review of Health Related Laws in Nigeria’

[164] S Iwuagwu, ‘The Rights to Health and Violation of Patient’s Rights: A desk review of Health Related Laws in Nigeria’

judgment up front in the discussion and uses his skills of persuasion based on clinical experience and firm opinion, yet ultimately he leaves the final decision to the patient.

There continues to be an intense argument about how best to conceive this relationship, but there is also growing international consensus that all patients have a fundamental right to privacy, to the confidentiality of their medical information, to consent to or to refuse treatment, and to be informed about relevant risk to them of medical procedures.

It seems that none of the models apply in all clinical circumstances. In an emergency, clearly the Paternalistic Model would apply since there is no time for discussion about values and preferences. It may also apply in some agrarian, third world cultures where the patient traditionally places all decisions in the hands of the physician and defers to his family all discussion with the physician. But in our modern pluralistic society, it would be foolish to presume physician and patient would espouse similar values and views of what constitutes a benefit thus this paternalistic model would rarely apply now.

The Informative Model would be operative when medical facts are all that is needed, e.g. when a specialist is consulted for a second opinion to confirm a diagnosis. But it erodes or negates the core virtue of caring so integral to the medical profession by reducing the role of a physician to a medical technician, disengaged from any meaningful relationship with his patient. Both physician and society bear responsibility for the rising influence of this model. Medical practitioners may be reluctant to make firm recommendations for fear of litigation if their opinion leads to a bad patient outcome. And in a consumer society, medical goods are like other commodities that can be bought and sold at the marketplace. Medical practitioners need to be more courageous and society needs to regain its moral bearings.

The deliberative model, which requires alignment of medical decisions with the patient's value system and, at the same time, engages the physician more directly and integrally in the process of working out the best decision, is a promising model. It encourages the physician to state frankly and directly his specific treatment recommendation and to explain how the decision is consistent with the patient's most noble values. It seems to me this depth of deliberation is rarely possible in one visit, but rather requires a history of on- going relationship. A primary care physician who sees a patient over a long period of time is in a perfect position to use the deliberative dynamic without much difficulty. And in the context of intensive care, a General Practitioner who sees patient and family at least daily can use the deliberative dynamic more easily than with a specialist who sees the patient only once or twice5.

In Nigerian Medical Jurisprudence, a patient has rights which are expected to be carefully respected by physicians and other healthcare providers that attend to him. The following are examples of these rights

1. Right to information:

He has to be well-informed about his illness, the nature of treatments, likely outcomes and side-effects, if any. A patient must have must be duly informed by the medical practitioner or the health care institution under whose care the patient is concerning the above-mentioned items. Right to information also includes the right to obtain medical records. The National Health Act 2014 provides patients in Nigeria a right to obtain their medical records, including medical practitioners' notes, medical test results and other documentation that is related to their care. The Act[165] provides thus:

[165] Section 23[1]

(1) Every health care provider shall give user relevant information pertaining to his state of health and necessary treatment relating thereto including: -

a) The user's health status except in circumstances where there is substantial evidence that the disclosure of the user health status would be contrary to the best interests of the user

b) The range of diagnostic procedures and treatment options generally available to the user

c) The benefits, risks, costs and consequences generally associated with each option and

d) The user's right to refuse health services and explain the implications, risks, obligations of such refusal.

2) The health care provider concerned shall, where possible, inform the user in a language that the user understands and in a manner which takes into account the user's level of literacy.

The right to information which includes medical record is also provided for under the Freedom of Information Act, 2011.

Notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established.

(2) An applicant under this Act needs not demonstrate any specific interest in the information being applied for.

2. The right to informed consent: His consent must be duly obtained before a surgical operation is carried out or any other special treatment authorized is to be given to him. If consent was given to a treatment by the patient, his decision must be respected. He may even reject blood

transfusion. However, his care-giver or medical practitioner has a duty to ensure that the patient is making an informed decision by provision of a proper explanation on the likely consequence of his rejection of a prescribed treatment on his health. No reasonable and reputable practitioner or facility that performs tests, procedures or administer treatments will do so without asking the patient or his guardian to sign a form giving consent. This right is called informed consent" because the practitioner is expected to duly provide clear and unambiguous explanations of the risks and benefits associated with that particular treatment prior to the patient's participation, although that does not always happen as thoroughly as it should. Section 21 of the Medical Code of Ethics provides: 'Practitioners involved in procedures requiring the consent of the patient, his relation or appropriate public authority must ensure that the appropriate written and signed consent is obtained before such procedures, either for surgery or diagnostic purposes are done, be they invasive or non-invasive. Consent forms should be in printed or written'

3. The right to confidentiality: A patient's medical records and other sensitive personal information should be kept confidential; they may be disclosed to a third party only with his consent.

4. The right to proper, considerate and respectful care: The patient has to be given quality and adequate services, subject to available medical facilities and provisions. He has to be treated with utmost care, professionalism and undivided attention. This means that a physician or any care-giver must not attend to him in a hasty and negligent manner. Treatment should be based on accurate diagnosis3.This right was given a statutory flavor by Constitution of the Federal Republic of Nigeria 1999[166] as amended.

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[166] ss34(a) and 42

5. The Right to Emergency Treatment: The provision of The National Health Act 2014[167] states: "A health care provider, health worker or health establishment shall not refuse a person emergency medical treatment for any reason whatsoever20 any reason whatsoever" covers all the common excuses for delayed care, from type of disease, mandatory up- front payment to police reports for gunshot wounds. All patients, regardless of their means, Financial, Social Status or health challenges, shall have the right to be treated in an emergency without discrimination. A violation of this particular right according to the provisions of *Section 20 (2)* of the after mentioned act is punishable by a fine of N100, 000.00 or imprisonment for up to six (6) months. Conclusion on Patient Rights in Nigeria. Patient rights in Nigeria are very fundamental to ensuring ethical, safe, and dignified healthcare. Rooted in constitutional guarantees, professional ethics, and statutes like the National Health Act 2014, these essential rights include proper access to care, informed consent, confidentiality, and the right to redress. Upholding patient rights not only promotes trust in the health system but also reinforces accountability and the rule of law. For meaningful enforcement, there must be continued public awareness, legal reform, and strong institutional commitment across the healthcare sector.

4.4 Enforceability of Arbitral Awards in Medical Negligence Cases in Nigeria

The primary objective of this part of the long essay is to properly ascertain whether an arbitral award made in a medical negligence dispute is enforceable in Nigeria Jurisdiction and to clearly outline the limitations of the enforcement of those awards. According to the renowned learned author of Commercial Arbitration in Nigeria,[168] the recognition and enforcement of arbitral awards

[167] s20 (1)

[168] FI Ajiogwu, 'Commerical Arbitration in Nigeria":Law and Practice' (Center for Commerical Law Development 2013).

is an important part of the Nigerian and international legal system, providing the final working legal mechanism for the conclusion of disputes governed by an arbitration clause. Award recognition and enforcement is dependent on several legal and procedural factors. While arbitration is a recognized alternative dispute resolution (ADR) mechanism under Nigerian law, its application to medical negligence, a sensitive area of tort law, requires careful consideration and more contributions.

Enforcement of Arbitral Awards in Nigeria.

The enforcement of arbitral awards in Nigeria is governed primarily by the Arbitration and Mediation Act, 2023 which is the primary legislation for Arbitration. Key provisions include:

Section 57(1)[169]: This provision States that an arbitral award is final and binding on the parties. Which means that any award given by an arbitral tribunal is binding on the parties and are enjoined to strictly adhere to provision of the award and the award is final and not subject to any appeal.

Section 57(2)[170]: This provision stipulates that an award to be enforced by a court as if it were a judgment of that court, upon application by the party seeking enforcement. This provision of the statute simply postulates that an award cannot be enforced by arbitral tribunal, an award can only be enforced by a high court upon an application by an award creditor. And upon the approval of the said application, the court would enforce the award as it's judgement.

[169] AMA 2023.
[170] Ibid

Section 58: Lists the grounds upon which a court may refuse enforcement. The Court can refuse the recognition and enforcement of any award upon an application by the award debtor and furnished with proof based on the following reasons which are:

a. The party to the arbitration was under some incapacity.
b. The arbitration agreement was invalid according to the law that the parties agreed to be applied (lex arbitri) or the arbitration agreement is invalid according to the law of the state that the award is going to be enforced.
c. When the award debtor was not allowed to present his case properly. Or when the award debtor was not given proper notice for the appointment of arbitrator(s).
d. When the dispute is non arbitrable based on public policy. Example when the medical negligence has elements of criminal negligence, it cannot be arbitrable because it is only a National Court with jurisdiction that attend to criminal offences and it is only within the purview of the state to institute a criminal action and it offends the public policy.

These provisions strongly reflect Nigeria's strong commitment to upholding arbitration as a viable mechanism for resolving civil disputes, including those arising in professional negligence settings provided that the subject matter is arbitrable.

Arbitrability of Medical Negligence Claims

Before an award can be enforced, the subject matter of the dispute must be one that is legally capable of resolution through arbitration.

Medical negligence claims that are purely civil in nature such as breach of duty, failure to meet standard of care, or wrong diagnosis, breach of contractual agreement may be arbitrable if there

was an arbitration agreement clearly stipulating that any disputes arising from the contractual relationship would refer to arbitration.

However, Medical Negligence claims involving criminal liability, such as gross negligence resulting in death etc., are non-arbitrable under Nigerian law, as only National courts have jurisdiction over criminal matters.

Thus, for enforceability, the arbitral award must arise from a valid and arbitrable dispute.

Prerequisites for Enforceability

An arbitral award will generally be enforceable in Nigeria where:

a. There is a valid arbitration agreement: The agreement must be written and voluntarily entered into by both parties, usually embedded in a patient-hospital contract or medical service agreement.
b. The tribunal was properly constituted: The arbitrators must have been appointed in accordance with the agreed provision of the arbitration agreement or the provisions of the Arbitration and Mediation Act or according to rules of the arbitration institute it was referred to (in the case of Institutional Arbitration) if there is no provision in the arbitration agreement for the appointment of arbitrator(s).
c. Due process was observed: The principle of fair hearing must be fully observed in the sense that both parties must have been given a fair opportunity to present their case. If one party was not notified or was unable to defend themselves, the court may set aside the award because it negates the principle of fair hearing.

The award does not conflict with public policy: Nigerian courts will not enforce an award that is contrary to public morality, safety, or national interest. Such reasons include if the medical negligence claims have criminal elements and certain tortuous medical negligence claims.

Grounds for Refusal of Enforcement of an award in line with Section 58 of the Arbitration and Mediation Act

1. The party must file an application before the High Court, supported by the arbitration agreement, a copy of the award, and evidence of notice and hearing

2. The court, if fully satisfied that the arbitration process was done accordingly, will register the award as its judgment, making it enforceable like any court decision.

CHAPTER FIVE

CONCLUSION

5.2 Summary

This research work critically examines the arbitrability of medical negligence in Nigerian medical jurisprudence, a subject that sits at the intersection of health law and dispute resolution. Medical negligence, categorically involving a breach of the duty of care by healthcare professionals or healthcare providers who were contracted by the patients therefore resulting in harm to patients, has traditionally over the years been resolved through litigation. However, the increasing demand for swift, efficient, confidential, and less adversarial dispute resolution mechanisms has brought arbitration into the limelight of dispute resolution.

The essay further explores the legal framework for arbitration in Nigeria, particularly under the Arbitration and Mediation Act (AMA), 2023, which affirms the enforceability of arbitration agreements and awards in civil matters. It further argues that medical negligence claims involving private rights, breach of contractual responsibilities and compensatory remedies fall within the scope of arbitrable disputes. Example of Such cases may include issues like misdiagnosis, surgical errors, or failure to obtain informed consent, so long as the relief sought is civil such as damages and not criminal in nature.

However, the work also identifies several negating factors that hinder full arbitrability of medical negligence. These include:

I. Public policy, especially where life, health, or bodily integrity of certain individual(s) or organizations are involved.
II. The possibility of criminal liability, which remains non-arbitrable under Nigerian law.

III. Power imbalances between patients and healthcare providers, raising concerns over fairness and voluntariness of arbitration agreements.

IV. Lack of sector-specific arbitration rules, making the process less predictable in sensitive medical matters.

Through analysis of statutory provisions and case law, the essay argues that medical negligence is conditionally arbitrable in Nigeria. Where the dispute is contractual or civil in nature, and where parties have voluntarily submitted to arbitration, the law permits it. However, enforcement of arbitral awards in such matters must also pass the test of public policy and procedural fairness,

5.2. Conclusion

The arbitrability of medical negligence in Nigeria represents a new developing intersection between healthcare accountability, sustainability and alternative dispute resolution (ADR). While arbitration offers several benefits such as confidentiality, speed, and expert adjudication its application to medical negligence disputes claims remains both legally vague and ethically complex.

Under Nigerian domestic law, particularly the Arbitration and Mediation Act, 2023, disputes arising from contractual obligations and civil wrongs are generally arbitrable. Thus, where medical negligence involves breach of duty in a contractual context or seeks monetary compensation, such matters are prima facie arbitrable. However, challenges arise when medical negligence disputes involve certain legal issues such as public policy, criminal liability, and certain infringement on fundamental human rights, which are exclusively within the purview of National courts. The inability of Nigerian courts to fully adopt arbitration in medical negligence cases is embedded in

certain legal issues concerning public interest or opinion, Traces of Criminal Elements, and Lack of Enforcing power of an Arbitration Tribunal. Nonetheless, with growing caseloads and backlogs of cases associated with Nigerian National Courts, arbitration remains an emerging and promising tool for resolving civil aspects of medical negligence particularly when embedded within clear, unambiguous contractual agreements and conducted according to the laid down principles of Contract.

In conclusion, while medical negligence is not wholly non-arbitrable in Nigerian Medical Jurisprudence, its arbitrability is conditional due to the following requirements which are compliance with clear laid down statutory provisions, a clear and distinct separation of civil liability from criminal culpability of the defendant in a medical negligence dispute and the existence of an arbitration that refers the healthcare providers and the patient to arbitration in an event of a dispute. Careful and Critical research by academia's, Creating and Strengthening legal awareness, an effective patient protection mechanism, and the enactment of sector-specific arbitration rules may enhance and appreciate the practical viability of arbitration in this sensitive area of law.

5.3 Contribution to Knowledge

This study makes several key contributions to legal scholarship and practical understanding regarding this sensitive area of law arbitrability of medical negligence in Nigerian medical jurisprudence:

1. A Well detailed explanation of Legal Boundaries

The Long essay critically analyzes and provides a clear and well-structured analysis of what constitutes an arbitrable subject matter under Nigerian law, particularly as it relates to the legal

issue of medical negligence. It highlights the distinction between civil claims (which may be arbitrated) and criminal or public interest matters (which remain non-arbitrable and remains within the purview of the National Courts), thereby contributing to a more nuanced interpretation of the Arbitration and Mediation Act, 2023.

2. Bridging a Research Gap

There is limited scholarly attention on the intersection between healthcare law and arbitration in Nigeria thereby facilitating the kennel of this long essay. This essay helps to reduce that gap by focusing primarily and specifically on the legal, ethical, and procedural challenges of resolving medical negligence disputes outside the traditional or conventional court system.

3. Integration of Legal and Ethical Perspectives:

The work elaborates and promotes arbitration as a viable and important complement to conventional litigation in the resolution of medical negligence claims, especially in drastic reduction of judicial backlog, promoting confidentiality, and encouraging faster remedies.

Overall, this study contributes to the evolving legal landscape of Nigerian Medical Jurisprudence by examining how arbitration can responsibly and effectively handle medical negligence disputes in Nigeria balancing the urgent need for access to justice with protection of public interest and patient rights.

5.4 Areas for Further Studies.

Further research is vitally needed in boost the reliance on arbitration in resolving medical negligence disputes in Nigeria and such areas includes

1. Comparative Jurisdictional Legal Study

There's room to examine how other countries especially those with similar legal systems like the UK, India, or South Africa handle arbitration in medical negligence cases. Legal researchers should draw parallels that would help improve Nigeria's approach.

2. Effectiveness of Arbitral Awards

More research is needed on how arbitral awards in medical disputes are enforced in Nigeria, particularly looking into whether parties comply and how efficient enforcement mechanisms are.

3. The Development of Medical Arbitration Frameworks

Nigerian Scholars can explore the possibility of creating guidelines or specialized rules tailored to resolving healthcare-related disputes, similar to what's done in construction or maritime arbitration.

4. Power Imbalance and Fairness

Several Studies could investigate how disparities in knowledge and influence between patients and healthcare providers may affect the fairness of arbitration agreements in medical settings.

5. Patient Awareness and Accessibility

Research could explore the level of understanding patients have about arbitration and whether they are truly willing or able to choose it as a means of resolving negligence claims and be able to provide means of increasing patients awareness and accessibility.

The using of arbitration in resolving medical negligence dispute is a novel approach in dispute resolution and it is very important that research needs to be done in the above specific areas in order to fully implement this novel approach.

5.1 Recommendations

Based on the findings of this research on the arbitrability of medical negligence in Nigeria, the following suggestions are made to address current legal and practical gaps:

1. Clarify Arbitrability in Medical Matters through Legislation

There should be express legislative provisions in Nigeria that clearly define whether and to what extent medical negligence disputes can be settled through arbitration. This would help remove the ambiguity currently surrounding the issue and assist the courts in determining when such matters are suitable for arbitration.

2. The Introduction of Specialized Arbitration Guidelines for Medical Disputes

It is important for stakeholders in the legal and health sectors to collaborate in formulating tailored arbitration procedures specific to medical and healthcare disputes. These should address matters like confidentiality, the use of expert witnesses, and fairness to all parties, especially patients.

3. Ensure Genuine Consent in Arbitration Clauses

When healthcare institutions include arbitration clauses in patient forms or contracts, such agreements should only be enforced where the patient has given clear, informed, and voluntary consent. Regulatory bodies must supervise this process to prevent coercion or unfair limitation of patient rights.

4. Promote Balanced Judicial Oversight

The judiciary should support the enforcement of arbitration in medical negligence cases where appropriate, especially in purely civil claims. However, courts must also intervene where public

interest, criminal liability, or constitutional issues are involved, in line with Section 55 of the Arbitration and Mediation Act 2023.[171]

5. Increase Public Education and Awareness

There is a need for sustained public sensitization efforts to educate patients, legal professionals, and healthcare providers about how arbitration can be a fair and effective method of resolving certain medical disputes. This would encourage more voluntary adoption of arbitration.

6. Build Expertise in Medical Arbitration

Arbitration institutions should invest in training professionals who possess the required skill for both legal and medical knowledge. This will help ensure that decisions in medical negligence cases are made by competent arbitrators capable of understanding the nuances of healthcare issues.

[171] Arbitration and Mediation Act 2023, s 55.

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